TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 83

MERION CRICKET CLUB, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 22, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN PENNSYLVANIA

DOCKET ENTRIES

Feb. 6, 1939. Complaint, filed.

Feb. 6, 1939. Summons exit.

Feb. 10, 1939. Summons returned: "on Feb. 7, 1939, served" and filed.

Apr. 25, 1939. Appearance of J. Cullen Ganey, Esq., for defendant, filed.

May 23, 1939. Answer filed.

Aug. 8, 1939. Stipulation of counsel amending complaint filed.

Aug. 11, 1939. Order to place case on Trial List filed.

Dec. 5, 1939. Trial by the Court.

Dec. 11, 1939. Defendant's motion for judgment filed.

Dec. 11, 1939. Defendant's requests for findings of fact and conclusions of law filed.

Dec. 26, 1939. Stenographer's transcript of hearing on Dec. 5, 1939.

Jan. 26, 1940. Opinion, Kalodner, J., finding verdict for defendant and granting judgment, filed.

[fol. 2] Jan. 26, 1940. Judgment for defendant, with costs, filed. 1-27-40 Noted & Notice mailed.

Feb. 1, 1940. Defendant's bill of costs filed.

Apr. 24, 1940. Plaintiff's notice of appeal filed. 4/25/40 copy to J. C. Ganey, U. S. Atty.

Apr. 24, 1940. Bond for costs sur appeal in $250, with Royal Indemnity Co., surety, filed.

Apr. 24, 1940. Copy of Clerk's notice to U. S. Circuit Court of Appeals filed.

July 19, 1940. Plaintiff's designation of contents of record on appeal, filed.

July 19, 1940. Points on which plaintiff intends to rely, filed.

July 19, 1940. Petition to extend time for filing & docketing appeal filed.

July 22, 1940. Order of Court extending time for filing record on appeal to July 23, 1940 filed. 7 23 40. Noted & Notice mailed. Copy to C. C. A.

[fol. 3] In United States District Court

Complaint—Filed February 6, 1939

1. The action arises under the Revenue Act of 1928, Act May 29, 1928, C. 852, § 413, 45 Stat. 864, U. S. C. Title 26 § 950; and the Act of February 24, 1925, C. 309, 43 Stat. 972, U. S. C. Title 28, § 41, as hereinafter more fully appears.

2. Plaintiff is a non-profit corporation organized and existing under the laws of the State of Pennsylvania. It is a social, athletic and sporting club located at Haverford, Pennsylvania.

3. The by-laws of plaintiff during all the times hereinafter set forth provided for the payment of club dues by the members, and plaintiff has regularly collected the dues tax on all said club dues and paid them to the Collectors of Internal Revenue.

4. Plaintiff, during all the times hereinafter set forth, has owned three grounds, two of them equipped with large club buildings. In these grounds and buildings plaintiff furnished numerous social and athletic facilities and rendered numerous services for the use of its members. Certain of these facilities and services were furnished to the members without special charge, and for certain other of them the members were required, if and when they desired to use them, to pay special fees in addition to the club dues.

5. Plaintiff, during all the times hereinafter set forth, owned and operated two 18-hole golf links and the by-laws of plaintiff provided that members who desired to play golf might obtain the privilege of playing golf for the year by the payment of a special annual golf fee, payable in two installments. The by-laws provided that before the end of each calendar year, each member exercising the golf privilege was given the option of terminating the privilege at the [fol. 4] end of the calendar year or of continuing it for the next year.

6. The amounts of said annual golf fees were as follows:

Men 21 years of age and over	$110.00
Non-resident	50.00
Juniors (under 21 years)	30.00
Women 21 years of age and over	50.00
Women under 21 years of age	30.00

7. On the demand of the Bureau of Internal Revenue, plaintiff collected from certain of its members the dues taxes on golf fees paid by them from July 1, 1931 to June 30, 1935, and paid the amounts so collected to the Collectors of Internal Revenue for the First District of Pennsylvania.

8. The names of said members, the amounts so collected from each of them, the dates when said amounts were paid to the said Collectors, and the total for each member, are set forth in "Exhibit A", attached hereto and made a part hereof. The aggregate amount was $18,690.29.

9. The said Collectors to whom the said taxes were so paid between July 1, 1931 and April 7, 1935 are each either dead or not in office as Collector of Internal Revenue at the present time, and the aggregate amount so paid to them between said dates was $641.67.*

10. Plaintiff is advised, believes and so avers that said golf fees were not club dues under the meaning of the Revenue Acts in such case made and provided.

11. A claim for refund of said amounts was duly filed by plaintiff and was rejected by the Commissioner of Internal Revenue on February 17, 1937.

[fol. 5] 12. Plaintiff brings this action on its own behalf, and on behalf of its members in accordance with the provisions of the Revenue Act and the Regulations appertaining thereto.

13. Plaintiff demands a judgment in its favor against defendant for $18,690.29 and interest.

(Sgd.) John Lewis Evans, Attorney for Plaintiff,
1930 Land Title Building, Philadelphia.

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* Amended to read $18,048.62.

EXHIBIT "A" TO COMPLAINT

(Record, p. 6)

Name of Member	Amount Collected from Member	Date Paid to Collect	Total
Hugh L. Adams	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
	5 50	2/16/33	
	5 50	8/22/33	
	5 50	2/17/34	
	5 50	8/17/34	
	5 50	2/14/35	49 50
David R. Albright	1 83	12/23/33	
	5 50	2/12/34	
	5 50	8/17/34	
	5 50	2/14/35	18 33
Frank C. Anderson	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
	5 50	7/18/33	
	5 50	8/22/33	33 00
Wm. Downs Anderson	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
* * * * * *			
[fol. 6]	5 50	2/16/33	
	5 50	8/22/33	
	5 50	2/17/34	
	5 50	8/17/34	
	5 50	2/14/35	49 50
Roscoe Tate Anthony	5 00	8/12/31	
	2 50	2/ 9/32	
	2 50	8/10/32	10 00
Wm. M. Armistead	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
	5 50	2/16/33	
	5 50	8/22/33	
	5 50	2/17/34	
	5 50	8/17/34	
	5 50	2/14/35	49 50
Wm. L. Austin, Jr.	11 00	9/15/31	
	5 50	5/ 4/32	
	5 50	1/13/32	22 00
* * * * * *			
John N. Adams	2 75	6/10/35	2 75
W. A. Barrows, 3rd	1 83	6/10/35	1 83
George E. Bass	5 50	4/13/35	5 50
James Carstairs	5 50	2/14/35	5 50
Dr. Harold W. How	1 83	7/11/35	1 83
Dr. Jacob J. Kohlhas	5 50	2/14/35	5 50
Emmet J. Murphy	5 50	2/14/35	5 50
Col. Charles R. Sanderson	3 00	4/13/35	3 00
Robert R. Titus	5 50	6/10/35	5 50
H. A. Waterworth	5 50	6/10/35	5 50
Charles Newbold Welsh	5 50	2/14/35	5 50
Total			$18,690 29

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 23, 1939

And Now comes The United States by its attorney, J. Cullen Ganey, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and says that it is defendant in the above entitled cause, and that it has a just, true, complete and legal defense to the whole of plaintiff's claim of the following nature:

1. Admitted.

2. Admitted.

3. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 3 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

4. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 4 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

5. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 5 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

6. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 6 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

7. Admitted.

8. Denied. Defendant says that the averments in paragraph 8 of the Complaint are irrelevant, immaterial, conclusions of law, and consequently need not be answered.

[fol. 8] 9. Denied. Defendant says the averments in paragraph 9 of the Complaint are irrelevant, immaterial, conclusions of law, and consequently need not be answered.

10. Denied. Defendant avers that the golf dues were club dues under the meaning of the Revenue Acts, and were properly and lawfully assessed and collected.

11. Admitted.

12. Admitted.

13. Demand admitted, liability denied.

Wherefore, it is denied that any sum is due and owing to plaintiff from defendant.

J. Cullen Ganey, United States Attorney; Thomas J. Curtin, Assistant United States Attorney.

[fol. 9] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Before Hon. Harry E. Kalodner, J.

Philadelphia, Pa., Tuesday, December 5, 1939.

Present: John Lewis Evans, Esq., for the Plaintiff. Thomas J. Curtin, Esq., and Donald M. Marran, Esq., Special Attorney, Tax Division, Department of Justice, for the Government.

MR. EVANS:

This action is brought to recover certain taxes collected by the Merion Cricket Club from its members and paid to the collector, the taxes being the ten per cent dues tax on the fees paid by the members of the club for the privilege of playing golf. A suit was brought by one of the members of the club to recover one payment of the tax. The case was tried before Judge Kirkpatrick and resulted in a judgment for the Defendant.

For reasons which I do not think necessary to state now, we decided it would be better to bring a new suit for the whole amount of the claim by the Merion Cricket Club, and this action has been brought, and involved twenty-five or thirty thousand dollars.

Now, it has been suggested that we should try this on the record in the Hardt case. There is everything in the record in the Hardt case necessary for each side, except the amount of the claim. The amount of the claim, of course, consists of a number of items which are stated in the com- [fol. 10] plaint, a great many items. And I had some corre-

spondence with the Government in regard to a shorter method of proving those figures, and nothing has been done in regard to that. Now, it is suggested that if we could try the case on the basis of the record in the Hardt case—I had an understanding that that would be done before the amount of our claim was proved. If Your Honor holds that we are entitled to recover, we would then take up with the Government the method of proving the amount of our claim. That would be a very laborious project, if we had to prove each item, because our books are kept—there are a great many short-cut arrangements in our books, and I thought it over pretty carefully, and we have got to prove each individual item, and in the complaint there are forty pages or something like that.

The Court. Was Judge Kirkpatrick's ruling ever taken up?

Mr. Marran: It wasn't, Your Honor.

Mr. Evans: No, it wasn't taken up. We did not take it up. But I believe, I think, Mr. Curtin will agree that it is a decision, of course, but is not res adjudicata, of course.

Mr. Curtin: No, it isn't res adjudicata, but the Government contends it is very persuasive in this Court, inasmuch as the claim for refund states the same grounds and the same facts as the case of Hardt v. McLaughlin.

Mr. Evans: Since the decision in the Hardt case, Judge Kirkpatrick decided a case, the Philadelphia Cricket Club, in favor of the Cricket Club.

Mr. Marran: On different facts, I might add.

Mr. Evans: Yes, on different facts. And it is our contention that the two decisions are not consistent.

(Discussion off the record.)

[fol. 11] Mr. Evans: I offer in evidence the record in the case of Frank M. Hardt v. M. S. MacLaughlin, Collector, September Term, 1931, Number 16376, including the stipulation of facts, portions of which were offered in evidence in that case, and the notes of testimony, it being agreed between the parties that this will constitute the record.

It is understood that with approval of the Trial Judge the case will be submitted to him without introducing evidence as to the amount of the claim, so that if the decision is in favor of the plaintiff, an opportunity will then be given to the plaintiff to prove the amount of his claim. If the de-

cision is in favor of the Government, no testimony need be taken as to the amount, the understanding being that if an appeal is taken and the Circuit Court of Appeals reverses such decision, the plaintiff will then have the opportunity of proving the amount of his claim.

Mr. Marran: The defendant offers in evidence the paragraphs of the stipulation which were offered by the Defendant in the case of Hardt v. MacLaughlin. The Defendant now offers in evidence the certified copy of the petition for refund filed by the Plaintiff in this case, and asks that it be marked Exhibit A.

(Certified copy of the claim for refund dated November 13, 1939, was marked Exhibit A.)

Mr. Graham: The Defendant offers in evidence a copy of the by laws of the club for the year 1931, and asks that it be marked Exhibit B.

(Book headed "The Merion Cricket Club 1931" was marked Exhibit B.)

Mr. Marran: And also a copy of the by-laws of the Merion Cricket Club for the year 1937 as Government's Exhibit C, as physical exhibits.

(Book bearing the heading "The Merion Cricket Club, 1937" was marked Exhibit C.)

[fol. 12] Mr. Evans: I move for judgment for the plaintiff for the amount claimed, and we will file requests for findings of fact and conclusions of law.

Mr. Marran: I move for judgment on the ground that the case of Hardt against MacLaughlin, and request the Court to find the facts as stipulated, and in the case of Hardt vs. MacLaughlin, which was made a part of the record in this case, and for the conclusions of law which will be filed later.

Excerpts from Transcript of Testimony in Hardt v. McLaughlin

(U. S. D. C. for E. D. of Pa., September Term, 1931, No. 16376; Record, p. 16)

Before Hon. William H. Kirkpatrick, J.

Philadelphia, Pa., Monday, June 17, 1935.

Present: John Lewis Evans, Esq., for Plaintiff. Charles D. McAvoy, Esq., United States Attorney, and Donald J.

Marran, Esq., Special Assistant to the Attorney General, for Defendant.

* * * * * * *

Mr. Evans: I offer Paragraphs 1 to 17, inclusive.

[fol. 13] (Paragraphs 1 to 17, inclusive, of the stipulation of facts read:

"Stipulation of Facts

It is hereby stipulated and agreed, by and between the parties in the above entitled case, and each of them, by their respective attorneys, that the following facts, together with exhibits hereto annexed, which are made a part hereof, shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true; and provided further, that either party hereto may object to the receipt in evidence of any or all of the facts set out herein by appropriate objection as to admissibility.

1. Defendant, J. L. MacLaughlin, was Collector of Internal Revenue for the First District of Pennsylvania from June 1, 1928, to June 11, 1932, and William J. Kyle is the present Acting Collector.

2. Plaintiff is, and has been since about October 1, 1919, a Family Member of the Merion Cricket Club, hereinafter called the Club, a social and athletic club of Haverford, Pennsylvania, and since said date has been exercising the privilege of playing golf at the Club, and has paid to the Club the annual amounts required to be paid by persons exercising said golf privileges.

3. On or about January 16, 1931, plaintiff paid to the Club one-half of the annual payment due the Club for golf privileges for the year 1931, the amount of such payment being $55.00. On or about July 2, 1931, plaintiff paid to the Club the second one-half of the annual payment due the Club for golf privileges for the year 1931, the amount of such payment being $55.00.

4. On or about May 28, 1931, plaintiff paid to the Club $5.50 as the dues tax on said payment of $55.00 made by

[fol. 14] plaintiff to the Club on January 16, 1931, as one-half of the annual amounts due the Club for golf privileges for the year 1931. The Club on or about June 17, 1931, paid said tax of $5.50 to the defendant herein.

5. On or about June 20, 1931 plaintiff filed with the Commissioner of Internal Revenue a claim for refund of said tax of $5.50. On August 26, 1931, the Commissioner of Internal Revenue rejected said claim for refund, and no part of said $5.50 has been repaid to the plaintiff.

6. A booklet was issued by the Club under date of April 1, 1931, which contains the charter, by-laws and house rules of the Club existing at the time of the plaintiff's payment of the tax hereinbefore referred to; also contains a list of the members and history of the Club. All or any part of said booklet may be introduced in evidence by either party hereto. Said by laws contain the following provisions:

Article I

Membership

Section 1. There shall be the following classes of members:

1. Proprietary Members. Any person heretofore or hereafter duly elected to membership, who is the holder of stock of the Haverford Land and Improvement Company to the par value of $1000 shall be a Proprietary Member and as such shall be entitled to all the privileges of the Club, without the payment of entrance fee, annual dues or assessments, and may obtain from the Treasurer cards of admission for the female members of his immediate family, which cards of admission shall entitle the holders at all times during the year for which they are issued to the privileges of the grounds and of those parts of the Main Clubhouse to which women may be admitted; and the sons, under the age of sixteen years, of all such members shall have the privileges of Junior Members free of charge.

[fol. 15] If such holder of stock be under the age of twenty one years, he shall be entitled only to those privileges which are accorded to other persons of his age.

Upon the transfer of his stock, such member shall lose the privileges herein granted, and shall be placed in any other class of membership he may choose and to which he is

eligible, without payment of an entrance fee. He shall, however, be liable to the dues payable by such class.

If the transferee of such stock is a member of the Club, or shall be duly elected to membership, he shall be subject to all the terms of this section. Women are eligible to Proprietary and Honorary, but not to any other class of membership.

The cards of admission which a Proprietary Member is entitled to obtain from the Treasurer for the female members of his immediate family, shall be issued to the following persons only:

First.—The wife and the unmarried daughters of such member.

Second.—The mother and the unmarried sisters of such member, if his father is not living.

Third.—The mother-in-law and the unmarried sisters-in-law of such member, if his father-in-law is not living.

Fourth.—All other unmarried women who are related to the member.

Such persons must be a part of the same family and reside permanently in the same house with the member, and have no other home.

2. Life Members, who shall have all the privileges of the Club without the payment of any annual dues or assessments. Any member not indebted to the Club, and any person duly elected to membership, who shall pay into the treasury of the Club the sum of $500 in cash, or in evidence of Club indebtedness to that amount, or in bonds to that [fol. 16] amount charged on real estate leased by the Club, shall thereby become entitled to all the privileges of the Club for the term of his natural life, without further payment of annual dues or assessments, and shall receive a certificate to this effect, signed by the President and Treasurer, and having the corporate seal affixed, attested by the Secretary. Said life Membership shall not be transferable in any manner whatsoever. If such Life Member be under the age of twenty-one years, he shall be entitled only to those privileges which are accorded to other persons of his age.

(Amendment of December 5, 1925.) The class of Life Membership is hereby abolished and no one shall hereafter

become a Life Member, provided that this amendment shall not affect the rights of any persons who were Life Members prior to March 11, 1892, known as Old Life Members.

3. Family Members, who shall be at least twenty-one years of age and shall be entitled to all the privileges of the Club: provided, that a married man under the age of twenty-one years may become a Family Member. Upon payment of the first installment of their annual dues they may obtain from the Treasurer cards of admission for the female members of their immediate families, which cards of admission shall entitle the holders at all times during the year to the privileges of the grounds and of those parts of the Main Club House to which women may be admitted, but such privileges shall not include the use of the Main Grounds for tennis, hockey or any other athletic purpose, for which use such women shall pay the annual fees provided in Article II, Section 2, 1. Those women who do not pay said fees may use the grounds for such purposes not more than four times a year upon payment of the usual ground fee. Such cards shall not be transferable, and shall be subject to revocation in case of non-payment of second installment of annual dues.

The cards of admission which a Family Member is entitled to obtain from the Treasurer for the female members [fol. 17] of his immediate family shall be issued under the same rules as provided in similar cases for Proprietary Members.

4. Senior Members, who shall be at least twenty-one years of age, and shall be entitled to all the privileges of the Club. Upon payment to the Treasurer of the additional annual dues for the current year, they may become Family Members.

5. Playing Members, who shall be at least twenty-one years of age, and shall have all the privileges of Senior Members, except the privileges and use of the Main Club House and Golf House. Playing Members of twenty-five years and over shall have the use of such House privileges as the Board of Government shall permit.[1] Playing Members holding that class of membership prior to November 1,

[1] By resolution of November 27, 1929, the Board granted to them the same privileges as those possessed by Senior Members.

1929, may be transferred, upon application, to Family or Senior membership, without payment of the additional entrance fee; provided, that application for such transfer is made on or before December 31, 1932. On and after January 1, 1930, no one shall be elected to Playing Membership who has reached the age of twenty five years, and an election or a transfer from Active Membership after November 1, 1929, shall be subject to the condition that such membership shall terminate when the member reaches the age of twenty five years; he may, however, transfer at that time to Family or Senior membership upon payment of the additional entrance fee, provided, that in case he had been transferred from Active membership the payment of an entrance fee is not required. Playing Members may apply for transfer to the Family or Senior class, and they shall have precedence of applicants for admission to the Club. Upon transfer they shall pay the additional dues for the current year and the difference between the entrance fee [fol. 18] of Playing Members and the entrance fee of the class of membership to which they are transferred.

6. Active Members, who shall be over sixteen and under twenty-one years of age, and shall have all the privileges of Playing Members under the age of twenty five years, except the right to vote and hold office. When they reach the age of twenty-one years they may be elected Family or Senior Members if there is a vacancy in those classes, or if not, they may be elected Playing Members, to remain as such until a vacancy occurs in the Family or Senior class, when they shall at once be transferred to the same on their original application, if they so desire, without the expiration of the six months' period of membership in the Playing class. They shall have precedence of applicants for admission to the Club. When so elected or transferred, they shall pay the additional dues for the current year, but no entrance fee.

7. Junior Members, who shall be boys under the age of sixteen years. They shall have the use of such portion of the grounds and of such implements and of such quarters as may be assigned to them, and shall be entitled to play upon the elevens of the Club, but shall not be eligible to office or have any right to vote. When they reach the age of sixteen years they shall become Active Members, and be charged with dues as such.

8. Army and Navy Members, who shall be Officers of the Army and Navy of the United States in active service, and shall be entitled to all of the privileges of the Club, except the right to vote. Upon payment of their first six months' dues, they may obtain from the Treasurer cards of admission for their wives and unmarried daughters, which cards of admission shall entitle the holders at all times during the year to the privileges of the grounds and of those parts of the Main Club House to which women may be admitted. Such cards shall not be transferable, and shall [fol. 19] be subject to revocation in case of non-payment of subsequent dues.

9. Non-Resident Members, who shall reside at least fifty miles from the Club Grounds, shall be at least twenty-one years of age, and shall be entitled to all the privileges of the Club, except the right to vote.

10. Honorary Members. The Club in Annual or Special Meeting assembled, may, on nomination of the Board of Government, elect any person to Honorary Membership; provided, that notice of the nomination of the Board shall be given in the call for the meeting.

Honorary Members shall be entitled to all the privileges of the Club, including the right to vote, and to obtain from the Treasurer for the female members of their immediate families, cards of admission similar to those issued to Family Members and carrying similar privileges. Honorary Members shall not be subject to the payment of annual Club dues or of annual Golf fees for themselves.

Sec. 2. 1. The total of the Family and Senior Memberships shall not exceed 1500, any increases over 1350 to be made by the Board of Government in its discretion from time to time.[2]

The total of the other classes of membership shall not be limited.

2. The number of members who shall be admitted to the exercise of golf privileges, exclusive of Playing, Active and Junior Members, shall not exceed 400[3] or such greater

[2] Down to date of publication, no increases have been made.

[3] By resolution of June 27, 1917, the Board raised this number to 540.

number as the Board of Government shall from time to time prescribe: Provided, That any person who is a member of the Club at the time of the adoption of this By-Law, [fol. 20] December 7, 1912, and who has remained a member continuously until the date of his obtaining golf privileges, shall be entitled at any time, irrespective of this limitation, to exercise golf privileges upon the payment of the regular golf fees. Playing, Active and Junior Members and women shall not be permitted to exercise golf privileges, except in such numbers and on such terms as the Board of Government shall from time to time prescribe.[4]

3. Members of the Club, and women having the privileges of the Club, desiring to play golf, shall pay, in addition to the other dues or sums for which they are annually liable, further fees for the privilege of playing golf; and in case of non-payment of the same, such persons shall be subject to the same penalties as provided for the non-payment of dues. Any person so electing to play golf in any year shall be liable for fees for the succeeding year, unless notice of a desire to withdraw shall be given to the Treasurer before December 31st of any year.

3a. A member of the Club while he is the registered owner of one thousand dollars at par of the stock of the Merion Cricket Club Golf Association shall be entitled to the use of the Golf facilities of the Club without payment of Golf fees.

* * * * * * *

Sec. 4. 1. All applications for membership shall be submitted in writing to the Committee on Membership, by two members of any class of membership, except Junior. The applicant must be personally known to both proposers. The Committee shall cause the names of candidates to be posted on the bulletin boards in the Club-houses, for two weeks before action shall be taken.

[fol. 21] 2. The Committee shall meet at least once a month at a stated time and place, notice of which shall be posted on the bulletin boards in the Main Club-house. Four

[4] At date of publication, Playing Members are not permitted to play golf; Non-resident, Active and Junior Members may play, with no limit on the numbers.

members shall constitute a quorum of the Committee, but the negative vote of two members shall be sufficient to exclude any candidate from membership.

3. Candidates elected by the Committee, shall upon payment of the required entrance fee and dues for the current year, or portion thereof, become members of the Club. The election of any candidate shall be void if he fail to make such payment within thirty days after the notice of his election has been mailed to the address stated in the application.

Sec. 5. 1. All resignations must be presented in writing to the Secretary, and shall be accepted by him if the member is not indebted to the Club. All resignations must be presented before the thirty-first day of December of any year, otherwise the member shall be liable for the entire dues of the following year.

* * * * * * *

Article II

Revenue

Section 1. An entrance fee of two hundred and fifty dollars shall be payable by all persons elected as Family or Senior Members: provided, that such persons, if under the age of 30 years, shall have the option of paying said amount in full upon election, or, of paying one hundred dollars at that time, seventy-five dollars at the expiration of one year thereafter and seventy-five dollars at the expiration of two years thereafter.

An entrance fee of twenty-five dollars shall be payable on election by all persons elected as Playing Members, except those transferred from Active Membership (Art. I, Sec. 1, 6).

[fol. 22] No entrance fee shall be paid by Army and Navy Members.

An entrance fee of fifty dollars shall be paid by Non-Resident Members when first elected members of the Club.

A golf entrance fee of one hundred dollars shall be payable when any man over twenty-one years of age or any Non-Resident Member shall be admitted, to the exercise of golf privileges: provided, that the golf entrance fee shall not be payable by any person who is a member of the Club at the time of the adoption of this amendment to the By-

Laws, December 1, 1923, and who has remained a member continuously until the date of his obtaining golf privileges.

Sec. 2. 1. The annual dues shall be as follows:

Family Members	$120.00
Senior Members	100.00
Playing Members 30 years of age and over (Elected prior to November 1, 1929)	100.00
Playing Members from 25 to 30 years of age (Elected prior to November 1, 1929)	75.00
Playing Members from 21 to 25 years of age	50.00
Active Members	30.00
Junior Members over the age of 12 years	10.00
Non-Resident Members	50.00
Annual amount for women with no relative in the home who is eligible to Family Membership (no payment to be required of them for Tennis, Hockey or other athletic purpose on the Main Club Grounds)	60.00
Annual fee to be paid by women for Tennis, Hockey or other athletic purpose on the Main Club Grounds (Art. I, Sec. 1, 3):	
Women 21 years of age and over	$30.00
Women 16 to 21 years of age	20.00
Women from 12 to 16 years of age	10.00

1a. The annual fees for Golf privileges shall be as follows:

Men 21 years of age and over	$110.00
Non-Resident	50.00
Juniors (under 21 years)	30.00
Women 21 years of age and over	50.00
Women under 21 years of age	30.00

[fol. 23] 2. The annual dues and fees of members and of women shall be payable in equal installments, one on the first day of January and one on the first day of July in each year, except those of Army and Navy Members which shall be payable as provided in Article I, Section 1, 8. Persons elected to membership, or admitted to Golf privileges, after July first of any year shall pay only one-half of the annual dues or fees for the current year.

* * * * * * *

3. Every member, on payment of his annual dues or of the portion thereof for which he may be liable, shall receive

from the Treasurer a card of admission, upon which shall be printed the privileges of the class of membership to which he belongs.

7. Beginning with the year 1923, the Club furnished the following form of application for the use of members desiring to obtain golf privileges:

Secretary, 19

The Merion Cricket Club:

I desire to avail myself of the Golf Privileges of the Club from until I advise you in writing to the contrary, on or before December 31st of any year.

Mr.
Mrs.
Miss (Date of 21st birthday)

Upon receipt of said form of application, daly filled out, it was the practice of the Chief Clerk of the Club to enter the name of the applicant on the list of those persons entitled to golf privileges and charge the person with the appropriate entrance fee and annual payment.

8. Members of the Club exercising golf privileges were entitled to use the golf links as often as they desired, with- [fol. 24] out further charge, and were also entitled to extend the courtesy of the golf courses of the Club to their wives or guests in the following manners:

(1) To take the wife or guest with them to play golf not more than four times in a year, and

(2) To request the usual ten-day card under Article IV, Section 2, page 48, which reads as follows:

At the written request of a member, the Board of Government may, at its discretion, extend an invitation for ten days to a person residing or having a place of business more than twenty-five miles from Haverford. Such invitations shall confer only the use of those houses and grounds of which the member himself has the use.

Such invitation may be renewed by the Board for a further period of ten days, but shall not be granted a second time to the same person until three months shall have elapsed after the expiration of the invitation or its renewal.

The issuance of such invitation shall be noted in a book provided for that purpose.

9. No members of the Club have been permitted to play golf at the Club unless they paid the annual amount fixed by the by-laws therefor; except that members on the waiting list for golf privileges were permitted limited use of the golf courses upon payment of daily green fees fixed by the Club. The present "Schedule of Green Fees" is as follows:

Waiting List—$3.00 per day except on Saturdays, Sundays and holidays during the months of May, June and September. On those days the charge will be $5.00 per day.

10. When no vacancies existed in the list of members entitled to golf privileges, the Secretary of the Club sent newly elected members a card reading as follows:

[fol. 25]

Founded 1865

The Merion Cricket Club

Haverford

Dear Sir:

The Board of Government has directed that attention be called to the fact that there are no vacancies in the list of members entitled to golf privileges, and that new members applying for the privileges of the golf course can obtain such privileges only in the order in which their applications are received and as vacancies occur.

Very truly yours, Wm. J. Serrill, Secretary.

11. The membership cards issued under Article II, Section 2, paragraph 3 of the By-laws do not contain any reference to whether or not the member is exercising golf privileges.

12. From 1919, when the plaintiff first began to exercise the golf privileges of the Club, until the present time, members have been permitted to play golf upon making an annual payment for the privilege in the same general method as in 1931. The only difference in the provisions of the By-laws concerning the playing of golf in force prior to 1929 and those in force subsequent to 1929, excluding changes in the amounts of the annual payment for golf privileges, is that prior to 1929 the annual payments were designated "golf dues" and subsequent to 1929 were designated "golf fees".

13. The report of the Board of Government of the Club dated February 6, 1932, showed that the total membership as of January 1, 1932, was 1,512 as against 1,718 as of January 1, 1931, and that the total number of persons exercising golf privileges as of January 1, 1932, was 831 [fol. 26] as against 1,043 exercising such privileges as of January 1, 1931.

14. The Income Statement of the Club for the year ended December 31, 1931, as shown by the Treasurer's Annual Report, is attached hereto as Exhibit 4, and made a part hereof. The amount paid for golf privileges during said year is designated in said statement as "golf fees".

15. In addition to golf the Club maintains facilities for the playing of the following organized sports by its members—cricket, tennis, association football, field hockey, skating, squash racquets, bowling billiards and pool.

16. The Merion Cricket Club has three pieces of property several miles apart:

a. The Main Grounds used for cricket, tennis, association football, and field hockey, and on which there are four buildings—(1) a large Clubhouse with locker rooms, squash courts, bowling alleys, billiards and pool tables, a restaurant, a ball room, sleeping rooms for members, servants' quarters and the usual rooms for social entertainment found in a large country club; (2) a building consisting entirely of sleeping rooms for members; (3) a small building containing lockers and dressing rooms for ladies; and (4) a large garage accommodating 35 cars.

b. The East Course on which there is an 18 hole golf course and a skating pond and a large Clubhouse with locker rooms, quarters for golf professionals and caddies, a restaurant and the usual rooms for social entertainment found in a large country club.

c. The West Course on which is the second 18 hole golf course.

17. On December 30, 1925, the United States District Court, for the District of Massachusetts, gave judgment for the plaintiff in the case of Weld v. Nichols, 9 F. (2d) [fol. 27] 977, from which no appeal was taken. Shortly after the said Weld decision was rendered, the Bureau of Internal Revenue allowed certain claims for refund filed

by clubs which deemed their golf dues payments to be within the scope of that decision. However, since the decision in Foran v. MacLaughlin, 59 F. (2d) 158, (certiorari denied, 287 U. S. 637), no claims of such character have been allowed. On the 14th day of January, 1930, the General Counsel of the Bureau of Internal Revenue prepared an opinion which was published in Internal Revenue Bulletin IX-2, pages 414-416. Said opinion of the General Counsel has been consistentiy adhered to and followed by the Commissioner of Internal Revenue since its promulgation.")

Mr. Evans: If the Court please, I offer in evidence the letters from the Bureau dated October 6, 1930, May 4, 1931, and August 26, 1931 showing the positions that the Bureau took. Do you want to read those?

Mr. Marran: Yes, I would like to read them. (The letters were shown to Mr. Marran.)

Mr. Marran: Do you want to argue further?

Mr. Evans: No.

(Letter dated October 6, 1930, from the Collector, J. S. MacLaughlin, to Merion Cricket Club, with attached copy of letter dated September 27 1930, was marked Exhibit P-1. A copy thereof follows:

[fol. 28] EXHIBIT P-1

"(Stamped)
Oct 8 1930

Treasury Department

Internal Revenue Service

Philadelphia, Pa.

Office of the Collector

First District of Pennsylvania

U. S. Post Office Building

October 6, 1930.

EO-WJK

Merion Cricket Club, Haverford, Pa.

SIRS:

Enclosed herewith is copy of letter received from the Commissioner of Internal Revenue dated September 27,

1930, relative to the collection of tax upon dues and membership fees with respect to annual dues for golf privileges.

You will note that the Department has directed me to call your attention to the fact that a previous ruling has been reversed and that you should collect tax in the future based on the annual charges for golf as well as annual dues paid by the various classes of members of your Club.

Respectfully, (Sgd.) J. S. MacLaughlin, Collector.

LBP—Enc.

[fol. 29] Copy

Treasury Department

Washington

MT:M:WJR September 27, 1930.

Collector of Internal Revenue,
Philadelphia, Pennsylvania.

Reference is made to the question of the liability under Section 413 of the Revenue Act of 1928 and corresponding sections of previous Revenue Acts of the Merion Cricket Club, Philadelphia, Pennsylvania, for collection of tax on dues and membership fees with respect to annual dues for golf privileges.

This question was previously considered by the Bureau, and it was held that the annual dues for golf privileges were not subject to tax as dues or membership fees under the provisions of section 501 of the Revenue Act of 1926. However, subsequent to that time a similar case was referred to the General Counsel for a ruling as to the taxability in the light of the decision rendered by the court in the case of Weld v. Nichols of annual charges made to members of a club for golf privileges. The court stated in the case of Weld v. Nichols that the words "dues or membership fees" were meant to cover fixed and definite charges applicable to all members of each particular class of membership.

The General Counsel held that the rule which the court prescribed embodies two requisites which must be met before payments made by the club members may properly be

regarded as "dues or membership fees", within the meaning of the decision. First, the payment must be made in satisfaction of a fixed and definite charge, and, second, this charge must be applicable to all members of each particular class of membership. It would appear that fixed and definite charges of this character are those which members must pay periodically for the continuance of any particular class of membership.

[fol. 30] According to the by-laws on file, the regular dues in the Merion Cricket Club range from $5.00 to $100.00 per year for the various classes of members. The by-laws provide that the annual dues for golf privileges shall be $95.00 for men, $32.50 for men from 21 to 23 years of age, $32.50 for nonresident, $20.00 for juniors, $35.00 for women over 23 years of age, and $20.00 for women under 23 years of age. It appears, therefore, that when a member elects to play golf, he becomes a golf playing member liable to a fixed and definite annual charge, depending on the class of membership to which he belongs, as long as he remains a member in that class.

You are advised that the case has been taken up for reconsideration in the light of the ruling furnished by the General Counsel, and it is held that the annual charges of $20.00, $32.50, $35.00 and $95.00 made to members for the use of the golf links, together with the regular annual dues are properly subject to the tax imposed by section 413 of the Revenue Act of 1928 and corresponding sections of previous Revenue Acts. The club should be advised to the effect that the previous ruling has been reversed and should be instructed to collect tax in the future, based on the annual charges for golf as well as the regular annual dues paid by the various classes of members.

(Signed) R. M. Estes, Deputy Commissioner."

MBS

Letter dated May 4, 1931, from the Deputy Commissioner, R. M. Estes, to Bromley, Evans & Staples was marked Exhibit P-2. A copy thereof follows.

[fol. 31] EXHIBIT P-2

"Treasury Department

Washington

Office of Commissioner of Internal Revenue

Address reply to

Commissioner of Internal Revenue

and refer to

MT:M:WJR May 4, 1931.

Bromley, Evans & Staples,
701 Commercial Trust Bldg.,
Philadelphia, Pennsylvania.

Gentlemen:

Reference is made to the question of the liability of the Merion Cricket Club, Haverford, Pennsylvania, for collection of the tax imposed by section 413 of the Revenue Act of 1928, based on amounts paid for golf privileges.

It was held under date of September 27, 1930, that the annual charges made to members for the use of the golf links, together with the regular annual dues, are properly subject to tax as dues or membership fees. However, in view of the contentions made by you, the question was referred to the office of the General Counsel for a specific ruling.

In the case of Weld v. Nichols (9 Fed. 2d 977) the question under consideration was whether the payment by a club member of $7.50, representing an additional fee for the privilege of playing golf for six months, could properly be held subject to the tax imposed on club dues or membership fees. In commenting upon the meaning of the words, the court said:

"* * * It seems clear that in clause (b) the words in question must refer to definite obligations incidental to membership in the club. Presumably the same expression is used in the same sense throughout the section. If so, the words 'dues or membership fees', in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership. This seems to me to be the underlying intention of the section."

[fol. 32] In accordance with the decision of the court where payments for club privileges are fixed and definite in amount and must be paid by all members belonging to any particular class or sub-class of membership, or by all members generally, such payments are taxable as club dues or membership fees. Fixed and definite charges of this character are those which members must pay periodically for the continuance of any particular class of membership. If the periodical payments so required are applicable to all members of each particular class, the two conditions required for taxability under the court decision are complete.

The schedule of dues and fees adopted by the club on November 23, 1929, sets forth the annual dues for the different classes of members and provides that "The annual fees for golf privileges shall be as follows:

Men 21 years of age and over	$110.00
Non-Resident	50.00
Juniors (under 21 years)	30.00
Women 21 years of age and over	50.00
Women under 21 years of age	30.00"

The amounts of $110.00, $50.00, and $30.00, payable by males who are members of the club, are specified as "annual fees for golf privileges". They are fixed and definite and are payable annually by the members. It is considered that these features are sufficient to bring the payments within the taxing statute. It is held, after consideration of the evidence on file, that the annual fees for golf privileges payable by men members twenty-one years of age and over, by non-resident members, and by junior members, are properly subject to tax as dues or membership fees within the meaning of section 413 of the Revenue Act of 1928.

It appears that the women included in the above schedule obtain the privileges of the club by the payment of these charges but that they are not members of the club. Since the payments of $50.00 and $30.00 made by women are not [fol. 33] made by club members, it is held that they are not "dues or membership fees" within the meaning of the revenue laws.

The above ruling is substantially in accordance with the decision rendered by the General Counsel.

Respectfully, (Sgd.) R. M. Estes, Deputy Commissioner.

EGB
cc-Philadelphia, Pa."

EXHIBIT P-3

Letter dated August 26, 1931, from the Commissioner, David Burnet, to Mr. Frank M. Hardt, was marked Exhibit P-3. A copy thereof follows:

"Treasury Department

Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to

MT:M:LS
CI:S:26418

Aug. 26, 1931.

Mr. Frank M. Hardt, c/ Fidelity-Philadelphia Trust Co., Broad & Walnut Sts., Philadelphia, Pennsylvania.

SIR:

Reference is made to your claim for the refund of $5.50, representing tax alleged to have been erroneously paid for the month of May, 1931, on dues in the Merion Cricket Club.

It is contended that the tax in question was erroneously paid on the semiannual payment of $55.00 made to the club for the privilege of playing golf and that such fee is not [fol. 34] dues or membership fees within the meaning of section 413, Revenue Act of 1928.

In the case of Weld v. Nichols (7 Fed. 2d 977) the question under consideration was whether the payment by a club member of $7.50, representing an additional fee for the privilege of playing golf for six months, could properly be held subject to the tax imposed on club dues or membership fees. In commenting upon the meaning of the words, the court said:

"* * * It seems clear that in clause (b) the words in question must refer to definite obligations incidental to membership in the club. Presumably the same expression is used in the same sense throughout the section. If so, the words 'dues or membership fees', in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership. This seems to me to be the underlying intention of this section."

In accordance with the decision of the court where payments for club privileges are fixed and definite in amount and must be paid by all members belonging to any particular class or sub-class of membership, or by all members generally, such payments are taxable as club dues or membership fees. Fixed and definite charges of this character are those which members must pay periodically for the continuance of any particular class of membership. If the periodical payments so required are applicable to all members of each particular class, the two conditions required for taxability under the court decision are complete.

The evidence on file shows that the annual fees charged men 21 years of age and over for golf privileges are $110.00. Such fee is fixed and definite in amount and is payable annually by the male members. It is considered that these features are sufficient to bring the payment within the taxing statute. It has therefore been held that the annual fees for golf privileges payable by men members 21 years of age and over, are properly subject to tax as dues or mem- [fol. 35] bership fees within the meaning of section 413, Revenue Act of 1928.

The claim is therefore rejected in full.

Respectfully (Sgd.) David Burnet, Commissioner.

MBC.
cc-Philadelphia, Pa.")

DEPOSITION OF A. WINSOR WELD

Mr. Evans: I am going to offer that deposition. I offer in evidence the deposition of A. Winsor Weld. I will read the deposition:

* * * * * * *

First Interrogatory: State your name and place of residence.

Answer: A. Winsor Weld, 47 Suffolk Road, Chestnut Hill, Massachusetts.

Second Interrogatory: What office, if any, do you now hold in the Country Club of Brookline?

Answer: President.

Third Interrogatory: Were you the Plaintiff in the case of Weld vs. Nichols, Collector, reported in 9 Fed. (2d) page 977?

Answer: Yes.

Fourth Interrogatory: After the decision in said case, what action, if any, did the Country Club of Brookline take with regard to the dues tax on the golf fees previously collected by the Club from the members and paid to the Collector, and what was the result of such action?

Answer: We made claim for refund and received amount we had paid.

[fol. 36] Fifth Interrogatory: Since the said decision, has the Club collected from the members the dues tax on the golf fees?

Answer: No.

Sixth Interrogatory: What is the present amount of the semi-annual fee for playing golf at the Brookline Country Club?

Answer: Twelve dollars fifty cents. ($12.50)

Seventh Interrogatory: Since the said decision, what changes, if any, have been made in the By-Laws, Regulations and practices of the Club with regard to the manner of charging members for the privilege of playing golf?

Answer: No changes, except that the semi-annual amount has been changed from time to time.

Eighth Interrogatory: Since the said decision, have the Government officials made any demand upon the Club that the Club collect the dues tax on semi-annual golf fees?

Answer: No.

Ninth Interrogatory: Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer: No.

TREASURY REGULATION 43 (PART 2)

* * * * * * *

Mr. Evans: I offer in evidence Treasury Regulations 43 (Part 2) relating to Tax on Dues, revised September, 1924, [fol. 37] these being the regulations in effect at the time of the Weld case, calling attention particularly to the third

paragraph of Article 9, on page 10, which contains this sentence: "So, also are extra charges which are imposed upon members for the privileges of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

And also, Example 7 of the same article: "The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee."

I also call attention to the fact that in the Weld case —

Mr. Marran: No objection to the letters.

Mr. Evans: —the bill of exceptions was withdrawn March 23rd, 1926, and that in May, 1926, another revision of Regulations 43, Part 2 was published by the Treasury Department, in which, under Article 9, the provisions are just the same as the previous one, except those two sentences I have read have been deleted, thus bringing the regulations in agreement with the decision in the Weld case.

Now, I call your attention to the fact that in the stipulation it is stated that after the Weld case refunds were made to clubs where the facts were the same as in the Weld case.

I call Mr. Lesley. Mr. Lesley, will you take the stand?

[fol. 38] Robert W. Lesley, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Evans:

Q. Mr. Lesley, you are the President of the Merion Cricket Club and have been for twelve years?

A. About twelve years.

Q. Yes.

A. Between twelve and thirteen, I think.

Q. You have been a member of the club since 1880?

A. Correct.

Q. In the stipulation that we have agreed to, Mr. Lesley, the proprietary membership consists of any person duly

elected to membership who holds a thousand dollars stock of the Haverford Land and Improvement Company. Now, the Haverford Land and Improvement Company is the corporation which owns the main grounds?

A. Right.

Q. And that provision as to proprietary membership has been in the by-laws since 1892?

A. Since we started to build the house.

Q. Yes.

Mr. Marran: Your Honor, may I object to any question as to the proprietary membership of this club? The question purely involves Mr. Hardt, who is a family member of the club. The question is whether or not he is liable for club dues, or the tax.

The Court: I will take it subject to your objection, note the objection,——

Mr. Marran: Exception.

The Court: —and reserve the ruling.

[fol. 39] By Mr. Evans:

Q. This provides that a holder of a thousand dollars of stock of the Haverford Land and Improvement Company shall be entitled to all the privileges of the club without the payment of entrance fees, annual dues or assessments. Is that the provision in the lease from the Haverford Land and Improvement Company——

A. Yes.

Q. —to the Cricket Club?

A. Yes.

Mr. Evans: I offer in evidence the lease from the Haverford Land and Improvement Company to the Merion Cricket Club, dated April 1, 1892, with particular reference to paragraph 7, which I will ask the stenographer to copy. That provides in the same terms of the proprietary membership——

* * * * * * *

Seventh. The said Lessee hereby agrees that any present or future member of the said Merion Cricket Club who is the holder of stock of the said Lessor to the par value of one thousand dollars ($1,000) shall be entitled to all the

privileges of any of the members of said Club without the payment of entrance fee, annual dues or assessments and may obtain from the Treasurer of said Lessor, cards of admission for the female members of his immediate family; which cards of admission shall entitle the holders at all times during the year for which they are issued to the privileges of the ground and of those parts of the main Club House to which ladies may be admitted; and the sons of all such members under the age of sixteen years (16) shall have all the privileges of junior members of the said Lessee, free of charge. It being distinctly understood and agreed that such cards of admission shall be non-transferrable.

It Is Also further stipulated and agreed that should such holder of stock to the amount of one thousand dollars [tol. 40] ($1,000) as aforesaid, be under the age of twenty-one years (21) he shall be entitled to only such privileges as are accorded to other members of the said Lessee of his own age. Upon the transfer of his stock such member so transferring shall lose all the privileges herein granted and shall be placed in any other class of membership in said Cricket Club, to be selected by him and to which he is eligible without the payment of any entrance fee and such members shall from thenceforth be liable to all the dues payable by such class so selected by him, or in the event of a life membership being chosen to the payment of five hundred dollars ($500). If the Transferee of any such stock is a member of the Lessee or shall be duly elected to membership he shall be entitled to all the rights and privileges herein referred to and under and subject to all the terms and provisions of this section.

* * * * * * *

By Mr. Evans:

Q. Now, Mr. Lesley, the first golf course was acquired in 1896?

A. Right.

Q. And since that time how have the members been permitted to play golf on the course, in the same manner as in 1931?

A. As far as I know, yes.

Q. Yes, and they were required to pay an annual fee for the privilege of playing golf?

A. Always an annual fee.

Q. In 1931 how many proprietary members paid that annual fee for playing golf?

A. That I can't tell you.

Q. Didn't you look that up and put it on your notes?

A. Well, I suppose I did. The books will show it.

Q. Third paragraph from the bottom, the first page, on the first page, the third paragraph from the bottom.

A. I haven't got it here.

Q. No, it is the one above that, the third paragraph.

[fol. 41] A. Forty-three proprietary members.

Q. Forty-three proprietary members paid the golf fee in 1931?

A. Yes.

Q. Have the proprietary members always been required to pay the golf fee?

A. Certainly, certainly.

Q. Did you say yes?

A. Yes, sure.

Q. Yes. The club made a claim for refund of the taxes collected on the golf fee following the Weld case, did it not?

A. Following the decision of the Court.

(Mr. Evans showed a paper to Mr. Marran.)

Mr. Marran: Objection is offered to the evidence respecting this claim for refund of the Merion Cricket Club. They are different parties and it is a different tax year.

The Court: Well, I will make the same ruling and take it all subject to the objection.

Mr. Marran: Exception.

By Mr. Evans:

Q. Is that the notice of adjustment of claim which the court received from the Government, with a check for $19,460.83.

(The witness examined the paper.)

A. Yes, signed by the Deputy Commissioner.

Mr. Evans: I offer that in evidence.

(Notice of adjustment of claim for refund, dated March 13th, 1928, from the Deputy Commissioner to the Merion

Cricket Club was marked Exhibit P-6. A copy thereof follows:

[fol. 42] "TREASURY DEPARTMENT

Internal Revenue Bureau

Form No. 7801—Jan., 1922

Comptroller General U. S.

January 18, 1922

Washington, D. C., Mar. 13, 1928.

Notice of Adjustment of Claim for Refund

MT:M:LS.

		Schedule
Claim No. S-354544	District 1st Pa.	No. MTR-541

Merion Cricket Club, % P. S. Talbert, 1016 Munsey Building, Washington, D. C.:

Your claim for refund of tax on green fees erroneously or illegally collected, has been adjusted as shown below.

Claimed $19,593.90, Allowed $19,460.83, Rejected $133.07

Date of Payment Claim presented July 31, 1926. Various dates from August 31, 1923, to May 18, 1926.

The claim is allowed for $19,460.83 since an investigation has disclosed that this amount represents taxes on extra charges collected from members for the privilege of using the golf course.

It is, however, rejected for $53.49 for the reason that this amount is barred from recovery by the four year statute of limitations. The claim is also rejected for $79.58 since this amount represents taxes claimed in error.

Included in the inclosed check is interest in the amount of $4,267.49.

A check by the Disbursing Clerk of the Department for the amount refunded is forwarded herewith.

Respectfully, (Sgd.) R. M. Estes, Deputy Commissioner.

[fol. 43] cc-Merion Cricket Club, Haverford, Pennsylvania.

FG:LCG.

1. Amount of taxes paid by claimant during the period of the claim as certified by the collector	$
2. Correct tax liability for the claimant for the period involved	$
3. Amount of tax refundable	$
4. Amount of penalties and interest refundable	$
5. Total amount refundable	$
6. Interest computed on the total amount refundable	$
7. Total amount for which the payment will be made	$ ")

By Mr. Evans:

Q. In the stipulation it is stated that Article I, Section 1 of the By-laws commences: "There shall be the following classes of members:", followed by ten paragraphs telling the ten classes of membership. Were those introductory words in the By-laws in 1892?

A. I don't think so, I don't remember.

Q. Are those the By-laws of 1892?

(By-laws were shown to the witness.)

A. 1892, that is right.

By Mr. Evans:

Q. How does the Article I, Section 3 commence, the first clause in it, the first words?

A. "There shall be the following classes of members".

Q. Of members, and that is followed by the seven classes?

A. Yes, sir.

Q. Practically the same as those that we have now, in other words, we have added three classes of membership since 1892, and the others remained substantially the same?

[fol. 44] A. Right.

Q. Paragraph 7 of the stipulation gives the form that we furnish to members for application for the golf privileges. Has it been customary to require that form to be

signed, or has it been customary to accept an informal notice to that effect?

A. I think that—if a member of the Merion Cricket Club, which entails the privileges of the club-house at Haverford and the other privileges thereunto pertaining wants to become a player at golf under the rules of the club he signs an application or he may simply notify the clerk at the desk.

Q. Yes.

A. To make a memorandum.

Q. Is it the practice of the clerk to get any approval from the Board or the Committee or an officer——

A. No.

Q. —to putting his name on the list?

A. No.

Q. Now, in regard to the termination of the privilege at any time before the end of the year, ——

A. Yes.

Q. —what is the practice of the club in regard to that? Do you require any approval of that termination by a board or a committee or an officer?

A. No, a notice is given to the clerk and he makes a note of it.

Q. Yes.

A. I suppose it might be said that the membership there, with payment of the sum fixed at the end of the year, is because of the great expense of maintaining the golf course.

Q. Yes, in other words, the club wants to know.

A. That is the reason it differs from other fees charged in the club, that is, the fee for billiard table, and fee for bowling alley,——

Q. Yes.

[fol. 45] A. —or the fee for any of the other privileges that are given in the club.

Q. Yes. Now, as to other fees for special privileges, did you prepare a list of those fees?

A. I did.

Q. Is that the list?

(A paper was shown to the witness.)

A. Yes.

By Mr. Evans:

Q. Will you read those through, please?

A. Locker-room five dollars a year.

Use of the skating pond, five dollars a year.
Care of a sedan car in the garage, $22.50 per month.
Sleeping room in the club-house, $55.00 a month.
Use of billiard table, sixty cents an hour.
Use of the squash court, forty cents for forty minutes.
Use of the ballroom, $35.00 for the evening.

Mr. Marran: I would like to object to that as irrelevant, immaterial and incompetent.
The Court: Same ruling.
Mr. Marran: Exception.

By Mr. Evans:

Q. Now, during the period when there was a waiting list for golf privileges——
A. Yes.
Q. —did the club permit the members on the waiting list to play golf upon the payment of a green fee?
A. Precisely as we would permit them to play on a billiard table.
[fol. 46] Q. Yes. Has the Government ever collected the tax on any of these fees for special privileges or on the fees paid by members on the waiting list for golf?

Mr. Marran: Objection.

A. Never to my knowledge.

By Mr. Evans:

Q. In the stipulation the By-laws state that every member is entitled to receive a card of admission from the treasurer upon which shall be printed the privileges of the class of membership to which he belongs. Are those the cards in use for the year 1930?

(The cards were shown to the witness.)

Mr. Marran: 1930 or 1931?
Mr. Evans: 1930.
Mr. Marran: Objection.
Mr. Evans: Well, I will prove that we couldn't——

A. Yes, various types, yes.

By Mr. Evans:

Q. Now, we made a search for a set of 1931 cards and couldn't find them, is that right?
A. Yes.

Q. And these are the same form that have always been used?

A. Same form as we get every year.

Q. Yes.

Mr. Evans: I just call attention to the fact that each card has the privileges of the membership and that it does not state whether or not the member is exercising golf privileges. That is our case.

[fol. 47] Cross-examination.

By Mr. Marran:

Q. Mr. Lesley, I understand you to say that if a member of the golf club wanted to discontinue playing he would just in an informal manner notify the clerk?

A. Right. I want to draw a distinction there, if you will permit me; we don't recognize that as a golf club; it is merely a golf house and a golf course, but it is not a golf club. The Merion Cricket Club is the club which through lease occupies that ground and occupies that house.

Q. But when you say, Mr. Lesley, that in order to terminate the privilege of playing golf all a member has to do is notify the clerk, are you aware of the By-laws that were in effect in 1931 at the Merion Cricket Club?

A. I haven't any recollection of them. If you have got them I will be glad to give them.

Q. Well, there is a section there that says: "Any person so electing to play golf in any year shall be liable for fees for the succeeding year, unless notice of a desire to withdraw shall be given to the Treasurer before December 31st of any year."

A. Yes.

Q. That is a correct statement of the By-laws?

A. That seems to be; it is an informal thing.

Q. You have a lot of members that are called playing members, haven't you, that play golf?

A. Not playing members that play golf.

Q. Well——

A. We have a membership at the Merion Cricket Club where a man is an active or a playing member.

Q. Well, they are called playing members?

A. In that branch of the club.

Q. I see.

A. But they aren't playing members at golf; they have to pay the golf fees which are ratably fixed for the various——

[fol. 48] By the Court:

Q. That word "playing member" has nothing to do with the golf?

A. Not at all, no.

Mr. Marran: Except that is what they are, as playing golf members.

Mr. Evans: No, they aren't allowed to play golf.

The Court: That is the old Cricket Club part of it; I don't think that had anything to do with golf. When they talked about playing, they meant playing cricket.

Mr. Marran: The By-laws provide here, Your Honor, they have a roll of membership in the back of the By-laws, and they give the different keys to membership. Then they have a little asterisk, and it says "Denotes golf privileges". Then when the different members have that asterisk over them, that means they have the golf privilege.

The Court: Yes.

Mr. Marran: Then in all the papers I have seen in the file they will have a bulletin saying, John Smith has transferred from one sort of a member to a playing member.

The Court: That doesn't mean a golf member.

Mr. Marran: If that is really the understanding, I am wrong.

The Witness: That is the understanding.

The Court: Yes, I think you are.

[fol. 49] The Witness: I think the real understanding, I want to be perfectly candid with you, we have so many varieties of sport that the men are grouped, you might say, we talk of the tennis members, and we talk of the golf members, we talk of the hockey members, because those might be called club political associations, or, in other words, we have an annual dinner and we put the golf members here, tennis members there, and the President of the club and the committees have got to know who are the different people forming these different groups, but it hasn't anything to do with the fees they pay, or anything else.

Mr. Marran: I see.

The Witness: Now, the broad policy we have tried to maintain has been that if you are a member of the Merion Cricket Club and paid your dues at the club-house at Haverford and have the facilities there you could play billiards, you could play bowls, you could play squash, and you could have a locker; all those at an extra cost. Now, those you paid without a fixed charge, but when you came to the keeping up of two hundred and fifty acres of golf——

Mr. Evans: Well, Mr. Lesley, I don't think you understand Mr. Marran's point. I think he is mixed up in the playing members.

The Witness: Yes.

By Mr. Evans:

Q. Playing members are defined as those who have all the privileges of senior members except the privilege of the use of the main club-house and golf house?

A. Yes, sir.

Mr. Evans: They are playing members as distinguished from house members, and they are not permitted to play golf.

[fol. 50] The Court: Yes, that is all right.

Mr. Evans: They are the only class of members who cannot play golf.

Mr. Marran: I confess error, then.

Mr. Evans: I think that explains that all right.

By Mr. Marran:

Q. Mr. Lesley, I am correct, though, when I say that if a member exercises the privilege of playing golf he is liable for the full year cost, which is one hundred and ten dollars?

A. If a man applies for the privilege of playing golf by the year——

Q. That is right.

A. —he pays a yearly fee of one hundred and ten dollars. Now, the purpose of fixing a yearly fee there, it may have been bad judgment, was this, that a golf course is a continuing——

Q. Yes.

A. —source of cost, whereas in playing of billiards we charge so much, which goes into the man's monthly ticket, but in golf we have got to maintain the east and west

courses in good order all the year around, and for that reason we don't care to have a man give it up.

By the Court:

Q. Then I understand, in addition to that,——

A. I beg your pardon.

Q. Then I understand that, in addition to that,——

A. Yes.

Q. —an ordinary member of the Cricket Club could play golf by the day on his payment of the daily greens fee, which would be the same as you would charge in case of a stranger who came there as a guest of a member.

A. He can pay, too, so many times in a year.

Q. Pay, too, so many times in a year?

[fol. 51] A. Yes, for instance, a man couldn't avail himself of this daily fee——

Q. That was four times a year?

A. Four times a year. If he had that, they would only avail themselves of it in the spring months or the fall months.

Q. And in addition to that, when the number of your golf playing members was complete and you couldn't take any more, then you allowed your general membership to use that as often as they pleased?

A. Absolutely, on payment of the greens fee.

Q. When there was a waiting list, that applied when there was a waiting list——

A. Absolutely.

Q. —for the golf privileges, that is, the annual golf privileges?

A. Right.

The Court: All right.

By Mr. Marran:

Q. When there was a waiting list, Mr. Lesley, wasn't it so that all members exercising golf privileges could not give them up unless they had another member that would step in and take their place——

A. Oh, no.

Q. —during the year?

A. No, no, never had such a rule. The desire to play golf was so great at one time that people would buy shares in the golf association.

By Mr. Evans:

Q. They never could give up the privilege——

A. Oh, no.

Q. —during the year unless there was a member on the waiting list prepared to take it up?

Mr. Marran: That is what I asked.

[fol. 52] Mr. Evans: I don't think he understood your question.

The Witness: You used the word, unless they presented a member.

Mr. Marran: Oh.

The Witness: There is no relation between the member who comes in and the member who goes out.

Mr. Marran: That is all.

By the Court:

Q. Well, suppose a time when you had a waiting list,——

A. Yes.

Q. —and one of those members wanted to quit playing golf or gave it up, we will say on the first of February,——

A. Yes.

Q. —and he had only acquired his privilege as of the first of January and wanted to give it up the first of February, and you had a waiting list, what would he do?

A. He would have to resign and pay the year's dues.

Q. That is all he could do?

A. That is all he could do.

Q. Then you would elect a new——

A. New member.

Q. Give the same privileges to somebody in his place?

A. Somebody else.

Q. So for that particular vacancy you would get two years' dues?

A. Right.

Mr. Evans: I don't think Mr. Lesley understood your question.

The Court: Well, I tried to make it clear.

[fol. 53] Redirect examination.

By Mr. Evans:

Q. Mr. Fahnestock's resolution provided, didn't it, when there was a waiting list if the member exercising golf privileges desired to stop in the year and there was a man on the

waiting list who desired to take his place, he could stop and his fees were prorated and refunded?

A. Well, I am perfectly frank to say, when the thing was so complicated, with members coming in and members wanting to get in, I know there was a resolution passed——

The Court: Well, that is in the stipulation.
Mr. Evans: That is in the stipulation.
The Court: All right.
The Witness: If there is a stipulation, it is there.
The Court: All right.
Mr. Marran: That is all, Mr. Lesley.
Mr. Evans: That is all, Mr. Lesley.

Plaintiff Rests

Defendant's Evidence

Mr. Marran: The Government for its defense wants to offer in evidence all the remaining facts in the stipulation as filed with the Clerk not already introduced by the attorney for the plaintiff.

Mr. Evans: I would like to record an objection to paragraph 22, which is the resolutions——.

[fol. 54] The Court: Well, I will take it subject to the objection.

Mr. Marran: Yes, all right.

(Paragraphs 18 to 23 of the stipulation of facts read:

"18. A true copy of plaintiff's application for membership in the Merion Cricket Club, marked Exhibit 1, is attached hereto and made a part hereof. Plaintiff, received a letter from the said Club dated September 24, 1919, a copy of which is hereto attached, marked Exhibit 2, and made a part hereof. Also a true copy of letter transmitted by plaintiff to the said Club under date of October 1, 1919, is attached hereto, marked Exhibit 3, and made a part hereof."

* * * * * * *

"19. A booklet was issued by the Club in 1917, containing a copy of the charter, by-laws, and house rules of the Club as they existed at the time of plaintiff's election to membership. Said by-laws provided for various classes

of memberships, including family membership. The entrance fee for a family membership was $100; the annual dues, $55. Said by-laws also provided for the payment of 'further dues' for the privilege of playing golf. Said 'annual dues for golf privileges' in the case of persons holding family memberships were:

Men over 23 years of age	$55.00
Men over 21 to 23 years of age	27.50

Both annual and golf dues were payable in equal installments on the first day of January and July of each year.

"20. Beginning with December 1, 1923, the by-laws of the Club, in addition to providing for the payment of 'annual dues for golf privileges', provided for the payment of a 'golf entrance fee' by persons obtaining said golf privileges as follows:

[fol. 55] A golf entrance fee of one hundred dollars shall be payable when any man over 23 years of age or any Non-Resident Member shall be admitted to the exercise of golf privileges: Provided, That the golf entrance fee shall not be payable by any person who is a member of the Club at the time of the adoption of this amendment to the By-Laws, December 1, 1923, and who has remained a member continuously until the date of his obtaining golf privileges.

"21. The 1917 by-laws of the Club, Article I, Section 2, paragraph 3, provided with respect to withdrawal from the golf privileges as follows:

Members of the Club and women having the privileges of the Club desiring to play golf, shall pay, in addition to the other dues or sums for which they are annually liable further dues for the privilege of playing golf; and in case of non-payment of the same, such persons shall be subject to the same penalties as provided for the non-payment of any other dues. Any person so electing to play golf in any year shall be liable for dues for the succeeding year, unless notice of a desire to withdraw shall be given to the Treasurer before December 31st of any year.

Said paragraph 3, Section 2, Article I, was carried without change into each succeeding edition of the Club's by-

from 1929 to 1931 the word 'dues' occurring in lines 4 and 9 of said paragraph, above quoted, was changed to 'fees'.

"22. The Board of Government of the Club on June 22, 1921, adopted the following resolution:

Upon motion of Mr. Fahnestock, duly seconded, the following preamble and resolution were adopted:

Whereas there is now a long list of applicants for golf privileges awaiting vacancies in the golf membership and a [fol. 56] number of members now holding golf privileges have signified their willingness or desire to surrender their golf privileges, thus creating vacancies which can be filled by members on the waiting list; and

Whereas it is the opinion of the Board that it is desirable to grant golf privileges to members applying for the same as speedily as can be done consistently with the avoidance of over-crowding the courses and no good purpose is to be served by retaining on the list of those having golf privileges members who do not desire to avail themselves of such privileges and thus retain their privileges to the exclusion of those who do desire to avail themselves thereof.

Resolved that the Secretary be and he is hereby authorized at any time to accept the surrender of golf privileges by any member tendering such surrender and the Treasurer be and he is hereby authorized to remit the fees of any member the surrender of whose privileges is so accepted, on a pro rata basis for the unexpired portion of the current period, provided there is at the time of such surrender another member of the Club in good standing on the waiting list for golf privileges ready and willing to accept such privileges and to pay the regular charges thereof for the unexpired balance of such term; and Provided further that any vacancy so created shall be filled by the first member on the waiting list who shall be ready and willing to fill the same.

The resolution of June 22, 1921, quoted above, was modified by a resolution adopted by the Board of Government on February 24, 1932, which reads as follows:

The Secretary called attention to the minute adopted June 22, 1921, authorizing the acceptance of golf membership resignations at any time during the year, provided there is

at the time another member on the waiting list ready im-
[fol. 57] mediately to fill the vacancy. As, at the present time, there is no golf waiting list the Board agreed that, as the fees for golf privileges are annual fees the same as Club dues, the member asking to resign should be required to pay his golf fees to the end of the year, until such time as there may be again a golf waiting list.

"23. Members admitted to golf privileges are liable to the Club for the full annual fee, except when admitted after July 1st. Except as provided in the Resolution quoted in Paragraph 3 of this Stipulation, it has not been the policy of the Club to make any refunds of or to release a member from the second semi-annual installment of the golf fee. On very rare occasions the Club has released a member from paying the second semi-annual installment where the reasons advanced by the member have been unusual. No refunds of amounts paid by the members for the privilege of playing golf are made under any circumstances."

* * * * * * *

Opinion in Habdt v. McLaughlin Filed January 14, 1936

Kirkpatrick, J.:

This suit was brought to recover the sum of $5.50, paid by the plaintiff as club dues tax for the calendar year 1931. The Revenue Act of 1928, Sec. 501(a)(1) and (d) applies. The trial was to the Court without a jury. A stipulation of facts was entered into, which is adopted by the Court as special findings of fact. In addition testimony was taken from which additional facts will be found.

The question involved is whether annual charges paid by members of the Merion Cricket Club to the Club for the privilege of playing golf on the club course are "dues" within the meaning of the Act.

[fol. 58] There are three reported decisions dealing with the question. They are Weld v. Nichols, 9 Fed. (2d) 977 (D. C. Mass.); and Baltimore Country Club v. United States, 7 Fed. Sup. 607 (D. C. Md.); which held similar payments not taxable, and Foran v. McLaughlin, 59 Fed. (2d) 158 (C. C. A. 9), which held them taxable. The intricacies of club organizations and the variety of membership distinctions will naturally lead to differing results in applying a general rule to particular cases. But I do not think that

these decisions disclose any real difference of judicial opinion as to the rule which governs and the test to be applied.

We start with the proposition that membership in any club involves certain basic payments (usually annual) which, at the least, give rights of ownership in the club property and in the government of the organization. In addition, most clubs provide various facilities and services, which some members will want to use and which others will not. Those who do almost always have to pay something for them in addition to their regular club dues. The rights thus obtained vary widely in kind and degree, ranging from those which involve practically nothing beyond the services of an attendant furnished by the club, such as having a car washed in the club garage or use of the club barber shop, to those which carry the privilege of using substantial portions of the club property, often representing a large permanent investment and rather definitely set apart and segregated as to upkeep and management, for example, a golf course with a separate golf club house where meals are served and bedrooms are to be had. Intermediate between these two extremes are a great variety of privileges not easy to classify and not necessary to consider in this case, involving the use of parts of the club equipment adapted to particular games or activities, such as the billiard tables, swimming pools, cards and card tables, squash courts, tennis courts and skating pond.

Of course, charges of fifty cents or a dollar for car washing or a pack of cards or the use of a billiard table [fol. 59] are not club dues in any sense of the word. The plaintiff argues that there is no substantial distinction between such payments and the yearly charge for golf privileges, involved in the suit. We turn to the cases for the guide.

Judge Morton in Weld v. Nicholas, the first of the three cases referred to above, proposed a test which he derived from reading clause (a) in connection with the last sentence of clause (b) which I think is entirely sound and satisfactory. He says the words " 'dues or membership fees,' in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership."

The Baltimore Country Club case expressly approved and adopted this test. I do not think that either what was decided or what was said in the opinion in Foran v. Mac-

Laughlin was in conflict with this. That opinion approaches the question from a slightly different angle and stresses the "recurring contractual" nature of the obligation but it really comes down to the same thing. When a club member, in order to exercise certain privileges and use certain club facilities in connection with them, assumes a binding obligation to pay a fixed definite charge, which obligation extends over a considerable period of time and will be automatically renewed until he withdraws from his preferred position as a user of the privileges in question (a "recurring contractual obligation"), he really has become one of a particular class of club members. That is, if we look at the substance of the thing and not at the terminology used in the by-laws, resolutions, notices and the like, and I think that everyone will agree that the form should not control the actuality.

In the case at hand it is true that the by-laws divide the Merion Club membership into nine classes, and that golf-playing members are not mentioned in the classification as distinct from any other class, but I cannot see any reason why members who have acquired the right to play golf on the club links — a right which club members do not have by virtue of their membership — by paying a regular [fol. 60] additional annual assessment are not just as much a class of members as those, say, who by paying more than the minimum regular dues get the right to have admission cards issued to the ladies of their immediate families which entitle the ladies to all the privileges of the grounds and the main club house ("family members" in the classification made by the by-laws).

There is no question about the binding nature of the obligation assumed when a member applies for and is granted a golfing status. If this occurs before January 1st he is obligated to pay $110 in two installments on the first of January and the first of July. If he plays six months and wishes to give up golf on the first of July he cannot avoid liability for the second installment unless there happens to be a waiting list for golf privileges and the Club chooses to relieve him and accept someone else in his place. Unless he notifies the Club before December 31st he will be automatically liable for another year's golf fees. This is exactly the same provision as applies to the regular membership dues, and resignations from the Club itself must

be presented before December 31st or else another year's liability will be incurred.

If he fails to pay the golf fees and continues in such default after being duly posted he loses not only the right to play golf but membership in the Club, because the by-laws provide that "in case of nonpayment * * * such persons shall be subject to the same penalties as provided for the nonpayment of dues."

Only a limited number of members may be admitted to yearly golf privileges and a regular waiting list is maintained for excess applications. As I understand the testimony, though it is not very clear and may not be of great importance, the rule has been that if the golfing quota was not full, club members generally were permitted to use the course only four times a year upon paying a daily greens fee, the only difference between them and non-members being that the latter had to be introduced as a guest of a [fol. 61] member. When the quota was full and there was a waiting list, club members were allowed to play as often as they pleased at the daily rate.

The plaintiff agrees that the test laid down by Judge Morton and stated above is the correct rule. His argument that it does not apply to him comes down in effect to the point that there is no class of golfing members eo nomine. If the form is to control he is right. If the substance, I think he is wrong.

I find as a fact that the plaintiff's payment of $5.50 which is the subject of this suit was a charge applicable to a particular class of members.

The plaintiff's requests for conclusions of law are denied. The defendant's requests for conclusions of law are all affirmed.

I find a verdict for the defendant and judgment may be entered thereon.

Defendant's Exhibit B

Extracts From By-Laws

Defendant's Exhibit "B", "The Merion Cricket Club 1931", pp. 41 and 43.

Art. II, Sec. 3. When the annual dues or fees or any portion thereof or a closet rent of any member or other

person having Club privileges shall remain unpaid for a period of two months after they are due the Treasurer shall send a notice to the delinquent, stating that if the same are not paid within one week thereafter his name with the amount due will be posted in the Club Houses and that he will be deprived of all Club privileges and of the use of the houses and grounds during the period of such posting and that unless the same are paid within two weeks after the date of such posting his membership shall cease. In case such indebtedness be not paid pursuant to such notice, the person in default shall thereupon cease to be a member of the Club and shall forfeit all his interest in the property of the Club, real and personal. Should he, however, explain [fol. 62] his default to the satisfaction of the Board of Government, and make payment, the Board shall have the power to reinstate him to membership. * * *

Art. II, Sec. 4. Accounts shall be kept of House and Garage charges and of items other than dues, fees and closet rents, and shall be rendered monthly. If an account shall remain unpaid for a period of one month from its date the Treasurer shall send a notice to the delinquent, stating that if the same is not paid within one week thereafter his name with the amount due will be posted in the Club Houses and that he will be deprived of all Club privileges and of the use of the houses and grounds during the period of such posting and that unless the same is paid within two weeks after the date of such posting his membership shall cease. In case such indebtedness be not paid pursuant to such notice, the person in default shall thereupon cease to be a member of the Club and shall forfeit all his interest in the property of the Club, real and personal. Should he, however, explain his default to the satisfaction of the Board of Government, and make payment, the Board shall have the power to reinstate him to membership. * * *

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed December 11, 1939

This case having been tried before the Court without a jury and counsel for the plaintiff having introduced the

record in the case of Hardt v. MacLaughlin, No. 16376, which record was accepted in evidence by the Court and which record contains a stipulation of facts entered into by and between counsel for the parties, which stipulation was adopted by the Court in Hardt v. MacLaughlin as its special findings of fact, the defendant therefore requests the Court [fol. 63] to find the facts as stipulated in the record in the case of Hardt v. MacLaughlin, together with the additional facts found by Judge Kirkpatrick in his opinion in the case of Hardt v. MacLaughlin, and the following conclusions of law:

I

That the taxes sought to be recovered in this action were lawfully assessed and legally collected by the defendant from the plaintiff.

II

That the complaint sets forth no facts which are sufficient to entitle the plaintiff to recover in this action.

III

That the amounts paid to the Merion Cricket Club for the privilege of playing golf during the period involved were dues within the purview of Section 413 of the Revenue Act of 1928.

IV

That the Commissioner of Internal Revenue properly disallowed plaintiff's claim for refund for club dues taxes assessed and paid for the period involved.

V

That under the law and the evidence the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

VI

That on the pleadings, the stipulation of facts and the evidence in this case defendant is entitled to judgment, together with costs.

J. Cullen Ganey, United States Attorney.

[fol. 64] IN UNITED STATES DISTRICT COURT

OPINION—Filed January 26, 1940

KALODNER, J.:

The plaintiff, a social, athletic, and sporting club, located at Haverford, Pennsylvania, is a non-profit corporation organized under the laws of the State of Pennsylvania. The plaintiff owned and operated two eighteen-hole golf links, and its by-laws provided that members who desired to play golf might obtain the privilege of doing so by the payment of a special annual golf fee. The plaintiff also owned other grounds and buildings, and it furnished numerous social and athletic facilities to its members, in consideration of the payment of the regular club dues. Certain of the facilities were furnished without special charge, and for other facilities—for example, golf—special fees were charged, in addition to the club dues.

The instant proceeding was brought by the plaintiff to recover certain taxes which it collected from its members and paid to the Collector of Internal Revenue—the taxes being ten per cent of the fees paid by members of the club for the privilege of playing golf. The ten per cent tax was collected by the club and paid over to the Collector of Internal Revenue in accordance with the provisions of the Revenue Act of 1928, Act May 29, 1928, C. 852, Sec. 413, 45 Stat. 864, U. S. C. Title 26, Sec. 950 (1).

Judge Kirkpatrick of this Court, in Hardt v. MacLaughlin, No. 16376, a suit brought by one of the members of the plaintiff club to recover the tax which he had paid on his golf fees, ruled that annual charges paid by members of the club for the privilege of playing golf are "dues" within the meaning of the Act of 1928, supra.

(1)

"Sec. 950. Tax—(a) Rate.

"There shall be levied, assessed, collected, and paid—
[fol. 65] "(1) Dues or membership fees. A tax equivalent to 10 percentum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year."

The instant case was tried before the Court without a jury. Counsel for the plaintiff introduced the record in the case of Hardt v. MacLaughlin, supra, which record was accepted in evidence by the Court. The record contains the stipulation of facts entered into by and between counsel for the parties, which stipulation was adopted by the Court in Hardt v. MacLaughlin as its special findings of fact.

The issue involved in the present proceeding was exhaustively reviewed by Judge Kirkpatrick in Hardt v. MacLaughlin, and his ruling in that case is dispositive.

FINDINGS OF FACT

I find the facts as stipulated in the record in the case of Hardt v. MacLaughlin, together with the additional facts found by Judge Kirkpatrick in his opinion in that case.

CONCLUSIONS OF LAW

(1) The taxes sought to be recovered in this action were lawfully assessed and legally collected by the defendant from the plaintiff.

(2) The complaint sets forth no facts which are sufficient to entitle the plaintiff to recover in this action.

(3) The amounts paid to the Merion Cricket Club for the privilege of playing golf during the period involved were dues within the purview of Section 413 of the Revenue Act of 1928.

(4) The Commissioner of Internal Revenue properly disallowed plaintiff's claim for refund for club dues taxes assessed and paid for the period involved.

[fol. 66] (5) Under the law and the evidence the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

(6) On the pleadings, the stipulation of facts and the evidence in this case defendant is entitled to judgment, together with costs.

Accordingly, I find a verdict for the defendant and judgment may be entered thereon.

In United States District Court

Motion for Judgment—Filed December 11, 1939

Now this 11th day of December, 1939, comes the defendant by J. Cullen Ganey, United States Attorney for the Eastern District of Pennsylvania, its attorney of record, and after the close of all the evidence, and respectfully moves the Court for judgment in favor of the defendant and against the plaintiff on the following grounds:

I

That the taxes sought to be recovered in this action were lawfully assessed and legally collected by the defendant from the plaintiff.

II

That the complaint sets forth no facts which are sufficient to entitle the plaintiff to recover in this action.

III

That the pleadings and the evidence in this case, with every inference of fact that may be drawn therefrom, are insufficient at law to warrant a judgment against the defendant.

[fol. 67] IV

That on the pleadings and the evidence in this case defendant is entitled to judgment dismissing plaintiff's complaint at plaintiff's cost.

Respectfully submitted, J. Cullen Ganey, United States Attorney.

In United States District Court

Judgment—Filed January 26, 1940

Before Kalodner, J.:

And Now, to wit: January 26, 1940, in accordance with the findings and verdict, it is Ordered that Judgment be and is hereby entered in favor of Defendant, The United States, and against Plaintiff, Merion Cricket Club, with costs.

By the Court, Attest: Gilbert W. Ludwig, Deputy Clerk.

[fol. 69] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1940

No. 7441

MERION CRICKET CLUB, Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, Defendant-Appellee

And afterwards, to wit, the 19th day of November, 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of March, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 70] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1940

No. 7441

MERION CRICKET CLUB, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed March 28, 1941

Before Maris, Clark and Jones, Circuit Judges

CLARK, Circuit Judge:

Some, at least, of the "leisure activities" said to be characteristic of a club[1] seem to have been devoted to tax liti-

[1] Clubs, 3 Ency. of the Social Sciences, pp. 573-577.

gation. So we find the member-taxpayers taking a broad view of the scope of "pleasure, recreation, etc."[2] and a narrow view of the meaning of "initiation fees" and "membership dues and fees". They first whittled at initiation fees,[3] Next, they succeeded in exempting assess- [fol. 71] ments.[4] Clubs responded to this by lowering dues and increasing assessments. So the device did not affect their economy, but did effect a tax saving. Congress naturally plugged both leaks.[5]

The principal case is one of a series arising out of their third move. Having failed to tip the anti-tax balance by calling dues assessments, they now wishfully call them "commuted greens fees". In other words, the general dues are still lowered but the resulting deficit is met by the creation of a "playing" membership. We may say that this second method of distributing operating costs has received the cooperation of considerable judicial hair-splitting. There are many decided cases and they may be found collected in 13 Words & Phrases 599 and (Supp.) 33 and 3 Prentice-Hall Federal Tax Service, 1940, Para. 29,544, and cited and discussed in two excellent law review notes.[6]

It is clear that Congress might well have taxed my payments to clubs. Such an excise would be the simplest kind of a tax on the sale of luxuries.[7] On a principle of

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[2] Internal Revenue Code, 26 U. S. C. A. 1940 ed. § 101 (9); What is a social club within statute imposing tax on dues or membership fees, 80 A. L. R. 1296; Construction and application of provision of income tax statutes exempting clubs, 130 A. L. R. 107; Taxation of Individuals as Members of Social Clubs, 26 Virginia Law Review 941 (note), subheading, Social, Sporting or Athletic Club?, at p. 942.

[3] Masonic Country Club v. Holden, 18 F. (2d) 553.

[4] Garden City Club v. Corwin, 62 (2d) 246. Cf. Fresh Meadow Country Club v. U. S., 17 F. Supp. 400, 401.

[5] Internal Revenue Code, 26 U. S. C. A. 1940 ed. § 1712 (a) and § 1712 (b).

[6] Taxation—Federal Excise Tax on Club Dues or Membership Fees, 24 Minnesota Law Review 713 (note); Taxation of Individuals as Members of Social Clubs, 26 Virginia Law Review 941 (note).

[7] Green, Theory and Practice of Modern Taxation (2d ed. 1938) 196.

de minimis and probably to save accounting intricacy, it selected the larger and more easily detectable. These are: "initiation fees", "assessments", and "membership dues and fees". As the term "dues" has been long in use in this country (the corresponding word in England is "subscription" [8]), it might well be said to have acquired a "trade usage". So testimony on that meaning might have been offered.[9] It has not been presented either to us or, so far as we know, to any other court. We think, however, that it sufficiently appears from the "common ground" of the [fol. 72] sociological and legal structure of social clubs. The latter has been adverted to in the text books and essays.[10]

The name itself is significant. It derives from the Anglo-Saxon "cleofan" and indicates a division of the reckoning.[11] The theory is one of joint expenditure.[12] Some clubs carry this theory to its logical conclusion and divide the entire cost of running the club among the whole membership. The glutton and toper eat and drink at the expense of their more abstemious brethren. The more athletic or enthusiastic golfer lives off his weaker or less zealous colleagues. Most clubs, however, do not carry this companionship idea to such lengths of sharing. They except and apportion to the particular recipients certain supplies and services. What remains comes from the members generally and the names and forms of their payments have always been those of "initiation fees" and "dues". It behooves us, then, to examine the basis of the difference and so to determine the distinction.

[8] Wise v. Perpetual Trustee Co., 1903 A. C. 139, 149; Carlisle and Silloth Golf Club v. Smith, 1912, 2 K. B. 177, 189-190; aff'd. 1913, 3 K. B. 75, 82-83.

[9] 7 Wigmore on Evidence (3d ed.) § 1955; 9 Wigmore on Evidence (3d ed.) § 2556.

[10] "It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy."

4 Amer. Jur. p. 457.

See also Escott, Club Makers and Club Members.

[11] "The word signifies uniting to divide", Timbs, Clubs and Club Life in London, p. 2.

[12] Timbs, above cited, p. 4.

Club facilities may be for common and repeated use or they may be for single and individual enjoyment. It is possible, although difficult, and may be unjust cost accounting (i. e. per divot) to divide that common use among the users. Such a division overlooks one element. The facility must be available irrespective of use (this applies to certain categories, perishables for instance, of the individual and single). For that reason, the apportionment must be general and cannot be allotted. A golf course is just as typical as a club-house. You consume a drink and you enjoy the special attention of a caddy, but you share the use of fairways that always await anxiously for your drives.

[fol. 73] The argument for the "commuted green fee" is then an attempt to extend a false analogy by disguised phrasing. The green fee is not an attempt to charge the appropriate fraction of a general cost. It is an arbitrary amount billed to non-members for the privilege of playing. Its character has been well described by a judge speaking in the home of golf. He says:

"* * * The revenue of the committee is to consist—in addition to a fixed contribution of 6s. per member payable by the golf clubs and a similar fixed charge payable by residents who use the links for playing golf—of fees levied on visitors and members of the general public who use the links for the game."

Carnoustie Golf Course Committee v. Commissioners of Inland Revenue, 1929 S. L. T. 366, 368-369.[13]

It is, in fact, more closely related to calendar than to cost.[14] Obviously nothing is added to an inaccurate description by the application of the common term for a collective payment.

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[13] Cf.:

"* * * It is said that the green fees alone would not nearly keep up the course and the club-house which the visitors enjoy, nor would the members' subscriptions without the visitors' green fees keep up the course and the club-house; that in either of those aspects the club would every year have a heavy deficit. By combining the two there is a less deficit, though there is still a deficit, because the difference between the receipts and expenditure has to be made good by members' subscriptions. Carlisle and Silloth Golf Club v. Smith, 1912, 2 K. B. 177, 189-190.

[14] It is common knowledge that most golf clubs scale their green fees according to the probabilities of congestion.

The cases have attempted a further confusing refinement. They suggest some budgeting principle. It is easier to run a club, or anything else for that matter, if one can dispense with prophecy. The courts have allowed this greater ease to assist not only the managers but the taxpayer-members, and have made exemption turn upon recurring certainty.[15] Such a view lacks logic. The budget would be even more [fol. 74] assisted by life memberships or by deposits to cover the purchase of consumables. Furthermore, the club with the best crystal-gazers or the most loyal members would escape the most taxes. In point of fact, the principal case falls inside even the questioned classification.

The judgment of the District Court is affirmed.

JONES, Circuit Judge, concurring:

In concur in the affirmance of the judgment below for the defendant. The learned trial judge, before whom the case was tried without a jury, based his action upon a ruling of the same court in Hardt v. McLaughlin, 25 F. Supp. 684, where the material facts involved were precisely the facts of the instant case.

The opinion in the Hardt case correctly construed the pertinent provision of the Revenue Act [1] with respect to the tax on club "dues or membership fees" and applied the statute to a proper appraisal of the character of the payments made by the club members for golf privileges. The payments were made in discharge of a yearly obligation (payable semiannually) which recurred so long as the member chose to enjoy, by failing to renounce prior to December 31st, the golf privileges for the ensuing year and in a sum arbitrarily fixed by the club without regard to whether the privileged member used the golf facilities much, little, or not at all. The charges were dues or membership fees in the ordinary acceptation of those terms and, therefore,

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[15] Contrast: Winchester Country Club v. White, 30 F. Supp. 142, aff'd, 117 F. (2d) 146; Philadelphia Cricket Club v. U. S., 30 F. Supp. 141; Foran v. McLaughlin, 59 F. (2d) 158, cert. denied, 287 U. S. 637; Hardt v. McLaughlin, 25 F. Supp. 684.

[1] Sec. 413 of Revenue Act of 1928, c. 852, 45 Stat. 791, 26 U. S. C. A. Int. Rev. Acts p. 441.

within the intent and meaning of the statute. In that situation, the club's by-laws and regulations, even though promulgated long before the enactment of the particular Revenue Act, are ineffectual to exclude the payments from the purview of the tax statute.

[fol. 75] The case of White v. Winchester Country Club, 117 F. 2d 146 (C. C. A. 1), takes away nothing from the decision in the Hardt case. The opinion in the White case expressly points out (p. 148) that there the privileges "could be taken and dropped informally at pleasure" as distinguished from the "recurring contractual obligation" in the Hardt case, whose pertinence to the facts of the present case has already been pointed out.

MAHS, Circuit Judge, dissenting:

I regret that I cannot concur in the conclusion reached by the court in this case. The question before us is whether annual golf fees collected by the Merion Cricket Club from those of its members who desire the privilege of playing golf on the club's courses are taxable under Section 1710 of the Internal Revenue Code (26 U. S. C. A. § 1710) as amounts paid "as dues or membership fees to any social, athletic, or sporting club." The Merion Cricket Club is a social and athletic club. It has ten classes of membership and for each class membership dues are fixed by the by-laws. Members of all the classes, except Playing Members (who do not have golf privileges), are given the privilege of playing golf for an annual fee, payable in semi-annual installments. The fees vary from $30 for members under 21 to $110 for male members over 21 and its amount does not depend on the class of membership to which the member belongs. The golf privilege can be terminated by notice before the end of any year. If not so terminated the member becomes liable for another year's fee. This method of charging members for the privilege of playing golf has been in effect since 1896.

The question turns upon the meaning to be given to the statutory terms "dues or membership fees." While these are words in common use and are not defined in the statute a number of federal courts have had occasion to consider [fol. 76] them and have indicated some limits to their meaning. Thus to be club dues or membership fees it has been held that payments by club members must be based upon membership in the club and must be payable by all the mem-

bers of a particular class of membership, not merely by those of the class who elect to make use of a special club facility. Weld v. Nichols, 9 F. 2d 977; Baltimore Country Club v. United States, 7 F. Supp. 607; Williamson v. United States, 12 F. Supp. 26; Philadelphia Cricket Club v. United States, 30 F. Supp. 141. Then also, they must represent a recurring, contractual obligation extending over an indefinite period of time. Foran v. McLaughlin, 59 F. 2d 158, cert. den. 287 U. S. 687.

The golf fees involved in this case do not meet these tests. They are not incident to any class of membership. On the contrary they are payable only by those members, of whatever class, who desire to make personal use of the golf facilities of the club. Nor are they indefinitely recurring obligations. While annually renewable in the absence of notice, the accrual of the obligation is entirely within the individual member's power. If he does not wish to make use of the golf facilities in the new year he may by notice to that effect divest himself of all responsibility for future golf fees. This, it seems to me, is inconsistent with the statutory concept of dues and membership fees.

In White v. Winchester Country Club, 117 F. 2d 146, the Circuit Court of Appeals for the First Circuit, upon facts substantially similar to those here involved, reached the conclusion that annual payments to a country club for golf privileges were not taxable as "dues or membership fees." That conclusion is in accord, as I have indicated, with the views of all the courts which have considered the subject except the court below in the present and a prior related case (Hardt v. McLaughlin, 25 F. Supp. 684). The case of Foran v. McLaughlin, supra, upon which the government relies, is not to the contrary, for the monthly greens fees held taxable in that case were a recurring con-[fol. 77] tractual obligation of those members of the Olympic Club who joined the class of Contributing Members which obligation extended over an indefinite period of time regardless of the members' desire to use the greens. They were obligations incidental to the class of membership and were, therefore, properly taxable as membership fees.

The golf fees of the Merion Cricket Club which we are considering were provided for in 1896, long before any tax on club dues was proposed. Neither tax evasion nor avoidance is involved. Being convinced that these fees are charges for the personal use of a special facility of the club

and that they are not membership fees I cannot agree that the judgment holding them to be taxable as the latter should be affirmed.

A true Copy. Teste:

_____, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 78] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7441

Merion Cricket Club, Appellant,

vs.

United States of America, Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

March 28, 1941.

William Clark, Circuit Judge.

Endorsements: Order Affirming Judgment. Received & Filed Mar. 28, 1941. William P. Rowland, Clerk.

[fol. 79] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and pro-

ceedings in this court in the case of Merion Cricket Club, plaintiff-appellant, vs. United States of America, defendant-appellee, No. 7441, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of April in the year of our Lord one thousand nine hundred and forty-one, and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 78] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. 1047

MERION CRICKET CLUB

vs.

UNITED STATES

STIPULATION IN RE RECORD

It is hereby stipulated by counsel for the parties in the above entitled case that for the use of this Court in considering the petition for a writ of certiorari, the printed record shall consist of the proceedings in the Circuit Court of Appeals for the Third Circuit and Part I of the Appendix to the petitioner's Brief and Appendix filed in that Court.

And it is further stipulated that if the petition for a writ of certiorari is granted, the record now in this Court shall be printed under the supervision of the Clerk of the Supreme Court for consideration of the case on the merits, and shall include the following portions of the certified copy of the record in the Circuit Court of Appeals now on file in this Court—Part I of the Appendix to Appellant's Brief and the proceedings in the Circuit Court of Appeals.

John Lewis Evans, Counsel for Petitioner. Francis Biddle, Solicitor General (A. Q.), Counsel for Respondent.

[fol. 79] [Endorsed:] No. —. October Term, 1940. In the Supreme Court of the United States. Merion Cricket Club vs. United States. Stipulation in re Record. John Lewis Evans, 1930 Land Title Building, Philadelphia, Pa.

[fol. 79] SUPREME COURT OF THE UNITED STATES

No. 83, October Term, 1941

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
MAY 1
CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~1047~~ 83

MERION CRICKET CLUB,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN LEWIS EVANS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1047

MERION CRICKET CLUB,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Merion Cricket Club, respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review a judgment of that Court in the above entitled cause, entered on March 28, 1941.

Opinions Below.

The opinion of the District Court (R. 64a) is not reported in the official reports. The three opinions in the Circuit Court of Appeals (R. 69a) are not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 28, 1941 (R. 76). The jurisdiction of this Court is evoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, 28 U. S. C. A. § 347.

Question Presented.

If the members of a club have the option of playing golf by the payment of an annual fee and the privilege can be terminated at the end of the year, are the golf fees subject to the 10% tax imposed by the Revenue Act of 1928 on dues or membership fees?

Statutes and Regulations Involved.

Sec. 413 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 864, (see 26 U. S. C. A. 1940 Ed., § 1710) imposes:

> "a tax equivalent to 10 per centum of any amount paid * * * as dues or membership fees to any social, athletic or sporting club."

The section is quoted in full in Appendix A (p. 6).

The pertinent Regulations are given in Appendix A (p. 7).

Statement of the Case.

This is an action by the Merion Cricket Club against the United States to recover $18,690.29 which the club collected from its members and paid to the collector, as the 10 per cent. Federal dues tax, on golf fees for the years 1931 to 1935.

The case was tried before Judge Kalodner and resulted in a judgment for the defendant. Judge Kalodner's opinion (64a) adopted without discussion that of Judge Kirk-

patrick in *Hardt* v. *McLaughlin*, 25 F. Supp. 684, a suit brought by a member of the Merion Cricket Club involving the same questions of law and fact, but from which no appeal was taken. The Hardt opinion appears in the Record (57a).

By agreement of the parties approved by the trial judge in this case, no evidence of damages was given with the understanding that if judgment was entered for plaintiff in the District Court, or on appeal, the plaintiff would be given an opportunity to prove the damages.

The by-laws provided for ten classes of membership with the qualifications, the privileges and the dues of each class (14a and 22a).

The by-laws provide (17a) that Playing Members (who have all the privileges of the club except the right to use the two club houses) may transfer to the Senior or the Family class, and that Senior Members (who have the same rights as Playing Members plus the use of the two club houses) may transfer to the Family Class (who have in addition the right to cards for the ladies of their household). But neither family nor Senior Members are permitted to move down to a lower class with lower dues.

Members of all the classes, except Playing Members (none of whom were allowed to play golf) (50a), were given the privilege of playing golf for an annual fee, payable in semi-annual instalments. The fees varied from $30. for members under 21, to $110. for male members over 21, and they did not depend on the class of membership to which the member belonged (20a and 22a).

The club had two club houses, one known as the main club house and the other as the golf house. All members who could use the main club could also use the golf house without regard to whether or not they had paid the fee for the privilege of using the golf course (17a).

The golf privilege could be terminated by notice before the end of the year, and if such notice was not given the member was liable for another year's fee (20a).

The club made fixed charges for the use of various other similar privileges and facilities for substantial periods of time, and the government has never demanded the dues tax on such fees (45a and 46a).

There was no confusion in the by-laws between the dues and the golf fees, or between the privileges which the members of the various classes of membership obtained by the payment of the dues and the golf privileges obtained by the payment of the golf fees.

The plan of membership set-up has been the same since 1892, and the method of charging for golf has been the same since 1896—21 years before the Federal dues tax was first imposed in 1917 (40a, 43a).

The Circuit Court of Appeals affirmed the judgment on March 28, 1941. Judge Clark wrote the opinion of the Court, Judge Jones wrote a concurring and Judge Maris a dissenting opinion.

Reasons Relied On for the Allowance of the Writ.

1. The decision rendered is in conflict with the decision of the Circuit Court of Appeals for the 1st Circuit in the case of *White* v. *Winchester Country Club*, 117 F. (2d) 146, and with that of the Circuit Court of Appeals for the 9th Circuit in the case of *Foran* v. *McLaughlin*, 59 F. (2d) 158, cert. denied, 287 U. S. 637, these cases being on the same matter as that involved in this case.

The decision is also in conflict with two District Court decisions in the 4th Circuit, decided in favor of the taxpayer and not appealed by the United States:

Baltimore Country Club v. *United States*, 7 F. Supp. 607 (D. C., Md. 1934).

Williamson v. *United States*, 12 F. Supp. 26 (D. C. W. D. N. C., 1934).

These cases are discussed in the supporting brief.

2. This case decides an important question of Federal law which has not been, but should be, settled by this Court.

The court's attention is called to the fact that the United States has filed a petition for a certiorari in *White* v. *Winchester Country Club*, *supra*, assigning the same reasons for the granting of the writ as are assigned in this petition, and that the Solicitor General states (p. 7 of that petition) that if that petition is granted, the Government will not oppose a petition in this case.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari be granted.

JOHN LEWIS EVANS,
Attorney for Petitioner.

May 10, 1941.

APPENDIX A.

The Revenue Act of 1928.

Section 413 of the Act approved May 29, 1928, Ch. 852, 45 Stat. at Large 864 (see 26 U. S. C. A. (1940) § 1710, Internal Revenue Code § 1710, 53 Stat. Part 1, p. 192), is as follows:

"Club dues tax.—(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to member-

ship, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

TREASURY REGULATIONS 43 (1928 REV.):

ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, that the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an "active resident annual member" of such club are in excess of $25 per year. "An active resident annual member" is a member who is neither a life nor a nonresident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associate or other partial membership.

The term "dues" is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year,

dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore not taxable.

Examples— • • •

(5) A certain golf club has two classes of members. Class A members pay $40 per year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to tax.

(6) A certain golf club charges a "green" fee of $1 for each guest that uses the course. Such a fee is not paid "as dues or membership fees," and is, therefore, not taxable as such.

• • • • • • •

(8) A tennis club in which the annual dues are $25 levies an assessment of $2 per year on each member to cover cost of tennis balls. The dues, fees, and such assessments paid by members of this club are taxable.

• • • • • • •

The fourth paragraph is derived from Article 9 of Regulations 43 Revised May 16, 1926, which was approved shortly after the decision of *Weld* v. *Nichols* (cited *infra* in our Brief). This 1926 Revision deleted from the Revision of September 1924 certain portions inconsistent with the *Weld* decision. In the following quotation from the 1924 Revision we have italicized the portions deleted by the Revision of 1926:

Art. 9. Dues or membership fees.

• • • • • • •

Where the dues or membership fees, determined in the manner herein outlined, of an active resident annual member are in excess of $10 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $10 per year, are subject to the tax. *So, also are extra charges which are imposed upon members for the privileges of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links.* A "greens fee" charged to a guest is not taxable, unless the right or privilege granted in return is for a period of time, such as a season. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the Act, and therefore not taxable.

* * * * * * *

Example 7. The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1047

MERION CRICKET CLUB,

vs.

THE UNITED STATES OF AMERICA.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

The petition contains a statement that the opinions below do not yet appear in the official reports, a statement of the grounds on which the jurisdiction of this Court is invoked and a statement of the case.

ARGUMENT.

Section 413 of the Revenue Act of 1928 (Appendix A of the petition, p. 6), imposes "a tax equivalent to 10 per centum of any amount paid * * * as dues or membership fees to any social, athletic or sporting club." The only question in the case is whether, if the members of a club have the option of playing golf by the payment of an annual fee and the privilege can be terminated at the end of the year, the golf fees are subject to this tax.

Summary of Argument.

We will show that the decision in the case at bar is in conflict with the decision in the *Winchester* case; that the theory and reasoning of the two majority opinions in the case at bar have no common basis; that each of the opinions is contrary to the principle laid down by the *Foran* case and by the two unappealed District Court cases in the Fourth Circuit; and that the meaning of the statute is now in such a confused and uncertain condition as to make an authoritative construction by this Court most necessary.

1. Analysis of the Three Opinions Below.

Judge Clark in delivering the opinion of the court (R. 69) starts his discussion with the meaning of dues or membership fees by stating that the word "club" is derived from the Anglo-Saxon "cleofan", meaning "to divide the reckoning" and that the theory of a club is one of joint expenditure. Some clubs divide the entire expenses among the whole membership. But most clubs except the cost of certain supplies and services and apportion the charge for them to the particular recipients. What remains comes from the members generally in the name and form of "initiation fees" and "dues". The charges which the club makes for those supplies, services, or facilities which *can* be apportioned and allotted to the particular recipients of them, are *not* dues. But when the cost of certain supplies, services and facilities cannot be so apportioned and allotted, the cost must be charged to the members generally and the charges are dues.

All the other twelve judges who have written opinions on the subject have based their discussions on the kind of *member obligation* included in the word "dues". Judge Clark disapproves the five cases most frequently cited and

their reasoning as "judicial hair-splitting" and "confusing refinements", and states that they lack logic.

Judge Jones in the concurring opinion (R. 73) states that these golf fees are dues or membership fees because

> "The payments were made in discharge of a yearly obligation (payable semi-annually) which recurred so long as the member chose to enjoy, by failing to renounce prior to December 31st, the golf privileges for the ensuing year and in a sum arbitrarily fixed by the club without regard to whether the privileged member used the golf facilities much, little, or not at all."

The dissenting opinion of Judge Maris (R. 74) defines dues or membership fees by stating that they

> "must be based upon membership in the club and must be payable by all the members of a particular class of membership, not merely by those of the class who elect to make use of a special club facility" and
>
> "they must represent a recurring, contractual obligation extending over an indefinite period of time."

The opinion points out that this definition is in accord with the two other Circuit Court of Appeals cases (*White* v. *Winchester Country Club* and *Foran* v. *McLaughlin*, which are discussed in detail later in this brief), and with the views of all the courts which have considered the subject except the District Court in the present and in a prior related case (*Hardt* v. *McLaughlin*, *infra*).

2. Analysis of the Conflicting Cases.

White v. *Winchester Country Club*, 117 F. (2d) 146 (C. C. A. 1st Circuit, 1941).

This case also involved the question whether annual golf fees were "dues or membership" fees under the Revenue Act of 1928. The by-laws provided for two classes of membership and that a member could play golf by the payment

of $50 a year for "Full Privileges" or $35 for "Limited Privileges"—the latter not permitting the member to play at certain times during the spring and fall months.

The opinion quotes the definition given by Judge Maris, which originated in the first and leading case of *Weld* v. *Nichols*, 9 F. (2d) 977 (D. C. D. of Mass., 1925), as follows:

> " 'definite obligations incidental to membership in the club', covering 'only fixed and definite charges applicable to all members of each particular class of membership.' "

The opinion (p. 148) cites *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (D. C., E. D. of Pa., 1936), which also involved the golf fees of the Merion Cricket Club and the facts of which were identical with those of the case at bar as it was tried on the record in the *Hardt* case. The opinion in the instant case comments on the *Hardt* case as follows:

> "In the Hardt case it appeared that the liability for golf fees was fixed in the same way as ordinary club dues, a 'recurring contractual obligation.' "

These conclusions, drawn from the *Hardt* opinion could hardly have been made if the evidence had been before the court.

1. The evidence in the *Hardt* case (44a) shows that the commencement and the termination of the liability to pay the Merion golf fee were each fixed by a simple notification to the club, without approval by the board, committee, or any official of the club,—just as in the *Winchester* case.

2. The Merion golf fee is "recurring" only in the sense that it "recurred so long as the member chose to enjoy [it]" as Judge Jones states in his concurring opinion. Precisely the same condition existed with the Winchester golf fee, as the club billed the member for the fee for the next year if the member failed to indicate whether he desired the privilege for another year.

There is one difference between the facts of the instant case and of the case at bar. Under the Winchester by-laws, the golf privilege was for one year, but it was the practice to adjust the annual fee if the member desired to terminate the privilege during the year. At Merion the fee could be adjusted during the year only when there was a member waiting and ready to take the privilege and pay the fee for the rest of the year. This condition existed for at least the first year of the period covered by the action for a refund. This distinction between the *Winchester* case and the case at bar turns on the strictness or formality with which the clubs were administered as stated by the Government in its petition for a certiorari in the *Winchester* case.

It is submitted that the *Winchester* case is directly in conflict with the case at bar.

Foran v. *McLaughlin*, 59 F. (2d) 158, cert. denied 287 U. S. 637 (C. C. A. 9th, 1932).

This case dealt with the monthly fees paid by a member of the Olympic Club of San Francisco who held a "Contributing A Member" privilege to play golf. These privileges were not governed by the by-laws and the evidence consisted of circulars to members, resolutions of the board and the golf committee and oral testimony by the president of the club. It appeared that in order to finance the construction of a new golf course, the board issued a circular stating "it is planned to create a class to be known as 'Contributing Members.'" A payment of $275, afterwards increased to $1,000, entitled the member to a class A or a class B privilege at his option. The class A privilege required the member to pay a monthly fee of $4, the fee involved in the case. A class B privilege entitled the member to play by paying a daily green fee.

These members were elected by the Board after action by the Golf Committee, the usual form of which was that the Committee "recommends that the following be elected to

membership in the Olympic Club Class A * * *" or "recommends that the following be elected to Class A Contributing Membership in the Olympic Club. * * *" There were pages of testimony of resolutions referring to "Class A Contributing Membership" in the club. There were a number of cases where the club refused to approve a termination of the liability to pay $4 per month and others where this was permitted on conditions.

The opinion does not rest its decision that the fees were club dues on the finding of fact by the District Court that "said 'Class A Privilege' has in fact a class of membership in said Olympic Club." After stating that counsel agreed that "dues" and "membership fees" were "synonymous and convertible", and discussing the contradictory character of the evidence as to whether a new Class of Membership had been established and stating that "The actual, true nature and character of a right, or of a thing, is determined by its essential characteristics and not by the name by which it is called", the opinion proceeds to distinguish *Weld* v. *Nichols* (*supra*) as follows (p. 160):

> "That case involved an 'additional fee' of $7.50 for the privilege of playing golf for six months, on which fee a tax of 75 cents was assessed. The report of the case does not disclose whether the club member holding the golf privilege was or was not compelled to pay the 'additional fee' for another six months at the close of the first six-month period. It is not shown whether the member would have been absolved from paying the six-month fee in case he had decided he did not desire to play golf during the ensuing semester. In other words, the printed record of the Weld case, supra, is silent as to whether or not the member's obligation to pay the fee was a fixed and *recurring* one, and one that carried with it contractual liability. As will be seen presently, the appellant's obligation was of this latter kind." (The italics are by the writer of the opinion.)

The opinion then shows, by specific instances from the minutes, that the liability to pay $4 per month was not terminable at the option of the member and concludes (p. 161):

> "The foregoing excerpts from the minutes clearly indicate that, by whatever name these Class 'A' memberships were called, they entailed upon their holders a fixed contractual liability to pay monthly green fees, regardless of their desire to continue to use the greens. Assuredly, then, these so called 'fees' were not for a single, casual, and occasional privilege—like a chance meal at the country club dining room—but represented a *recurring contractual* obligation, extending over an indefinite period of time, and, in the language of the Weld case, supra, 'incidental' to a 'particular class of membership.' We therefore believe that these 'fees' were properly taxed.
>
> "Judgment affirmed."

Judge Jones holds in the case at bar that the golf fees are dues because the yearly obligation "recurred so long as the member chose to enjoy [the privilege]".

The *Foran* case held that golf fees were dues only because they constituted a "liability to pay monthly green fees, regardless of their [the members'] desire to continue to use the greens."

It will be seen that the reasoning and theory of this case and the definition of dues or membership fees which it lays down so distinctly, are in direct conflict with both the majority opinions in the case at bar. If, by reason of the fact that the judgment was in favor of the Government, the decision of the instant case is not in conflict with that of the case at bar, under the first sentence of Rule 35, 4, b, we asked that it be considered under Point 3 of this brief as a strong reason why this question of Federal law should be settled by this Court.

There are two cases in the Fourth Circuit from which the Government did not appeal.

Baltimore Country Club v. *United States*, 7 F. Supp. 607 (D. C., D. of Md., 1934). In this case the Government argued that the members who paid a semi-annual golf fee constituted "a particular class of membership" under the *Weld* definition. The court held (p. 608) that the golf fees were not dues or membership fees "because they are not based upon membership. They are not assessed upon any group or class of members because of membership. They are not required of any member unless he desires to play golf."

Williamson v. *United States*, 12 F. Supp. 26 (D. C., W. D. of N. C., 1934) is to the same effect.

3. This is an Important Question of Federal Law Which Should be Settled by This Court.

The Government in its petition for a certiorari in the *Winchester* case referred to the difficulty of administering this revenue measure in view of this diversity both of result and theory. From the taxpayer's standpoint the need for an authoritative definition of dues or membership fees is still more evident.

There are 621 members of the Merion Cricket Club whose claims are involved in the case at bar, to which should be added those who have started playing golf since 1935. It is likely that the great majority of clubs having golf links charge for their use by means of an optional golf fee terminable at the end of the period. Some of them doubtless have brought actions and the trials have been continued pending an authoritative decision. In other cases, the difficulties and expense involved have led to postponement of action.

So far as our knowledge goes the golf fees are the only periodical fees upon which the government has demanded the tax. As examples of such fees we refer to those of the Merion Cricket Club (45a). There are doubtless numerous other similar fees charged by other clubs. In the 1st, 4th

and 9th Circuits none of these fees are taxable. In the 3rd Circuit, on account of the entirely different approach of the two majority opinions, no one could guess which are taxable and which not.

A reasonable taxpayer (if there is one) should not object to a luxury tax such as this. But the golfing fraternity is widespread and an authoritative decision as to the meaning of this Statute by this Court, however the two cases are decided, would go far to silence the numerous criticisms we hear as to the general administration of this tax law.

We respectfully submit that the certiorari should be granted.

JOHN LEWIS EVANS,
Attorney for Petitioner.

May 10, 1941.

(4281)

No. 83

IN THE

Supreme Court of the United States

October Term, 1941

MERION CRICKET CLUB,
Petitioner,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONER

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October Term, 1941

MERION CRICKET CLUB,
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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 51) is not reported. The opinions of the Circuit Court of Appeals (R. 54) are reported in 119 F.(2d) 578.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 28, 1941 (R. 61). The petition for a writ of certiorari was filed on May 12, 1941, and was granted on October 13, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Ch. 229, 43 Stat. 936).

STATEMENT OF THE CASE

This is an action by the Merion Cricket Club against the United States to recover $18,690.29 which the club collected from its members and paid to the collector, as the 10 per cent. Federal dues tax, on golf fees for the years 1931 to 1935.

The tax was collected under the Revenue Act of 1928 (Sec. 413 of the Act approved May 29, 1928, Ch. 852, 45 Stat. 864; 26 U. S. C. A., 1940 Ed., §1710; Internal Revenue Code §1710, 53 Stat. Part 1, 192), which imposes:

> "A tax equivalent to 10 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club."

The section is given in full in Appendix, p. 34.

The case was tried before Judge Kalodner and resulted in a judgment for the defendant entered on January 26, 1940. Judge Kalodner's opinion (R. 51) adopted without discussion that of Judge Kirkpatrick in *Hardt v. McLaughlin*, 25 F. Supp. 684, a suit brought by a member of the Merion Cricket Club involving the same questions of law and fact, but from which no appeal was taken. The *Hardt* opinion appears in the record (R. 45).

By agreement of the parties approved by the trial judge, no evidence of damages was given with the understanding that if judgment was entered for plaintiff in the District Court, or on appeal, the plaintiff would be given an opportunity to prove the damages.

The by-laws of the Merion Cricket Club provided for ten classes of membership with the qualifications, the privileges and the dues of each class (R. 10 to 14).

The by-laws provide (R. 12-13) that Playing Members (who have all the privileges of the club except the right to use the two club houses) may transfer to the Senior or the Family Class, and that Senior Members (who have the same rights as Playing Members plus the use of the two club houses) may transfer to the Family Class (who have in addition, the right to cards for the ladies of their household). But neither Family nor Senior Members are permitted to move down to a lower class with lower dues.

Members of all the classes, except Playing Members (none of whom were allowed to play golf) (R. 15), were given the privilege of playing golf for an annual fee, payable in semi-annual instalments. The fees varied from $30 for members under 21, to $110 for male members over 21, and they did not depend on the class of membership to which the member belonged (R. 17).

The club had two club houses, one known as the main club house and the other as the golf house. All members who could use the main club could also use the golf house without regard to whether or not they had paid the fee for the privilege of using the golf course (R. 12).

The golf privilege could be terminated by notice before the end of the year, and if such notice was not given the member was liable for another year's fee (R. 15).

The club made fixed charges for the use of various other similar privileges and facilities for substantial periods of time, and the government has never demanded the dues tax on such fees (R. 35, 36).

There was no confusion in the by-laws between the dues and the golf fees, or between the privileges which the members of the various classes of membership obtained by the payment of the dues and the golf privileges obtained by the payment of the golf fees. The by-laws are analyzed in detail in the Appendix.

The plan of membership set-up has been the same since 1892, and the method of charging for golf has been the same since 1896—21 years before the Federal dues tax was first imposed in 1917 (R. 34, 31 and 32).

Treasury Regulations 43 (Part 2), revised September 1924, Article 9 (pp. 10, 11) (Appendix p. 36) contained the following:

> "So, also [subject to the tax] are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

and among the examples:

> "(7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured by the member's family. A payment of this extra $10 is taxable as a membership fee."

These Regulations were in effect when the case of *Weld v. Nichols*, 9 F.(2d) 977 (Mass.), was decided on December 30, 1925. This was the first case on the meaning of "club

dues" and it decided, directly contrary to the Regulations, that a semi-annual fee for the privilege of playing golf was not club dues. The government withdrew its bill of exceptions on March 23, 1926 (R. 29). The Government made a refund to the club and no demand for the payment of the tax has since been made (R. 28).

Shortly after the withdrawal of the Bill of Exceptions a new revision of the regulations was made — Treasury Regulations 43, Part 2, May 21, 1926, which deleted the two portions of Article 9 quoted above (Appendix p. 36). The two deleted portions have not appeared in the Treasury Regulations since then.

After the *Weld* decision, the Bureau of Internal Revenue allowed claims for refund where the facts were within that decision (R. 20-21).

Among these claims, the Government paid the Merion Cricket Club $23,728.32 on March 13, 1928, on a claim allowed because it "represents taxes on extra charges collected from members for the privilege of using the golf course" (R. 33). From the dates of the payment of the golf fees so refunded to the dates of the payment of the golf fees involved in the case at bar, there was no substantial change in the by-laws (R. 19).

On May 29, 1928, the Revenue Act of 1928, involved in the case at bar, was approved.

From the judgment for defendant, the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit which affirmed the judgment on March 28, 1941, two opinions and a dissenting opinion being filed (R. 54).

The writ of certiorari was filed on May 12, 1941, and was granted on October 13, 1941.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that golf fees of the Merion Cricket Club were "dues or membership fees" under the Revenue Act of 1928.

2. In affirming the judgment of the District Court for the defendant.

3. In not entering judgment for the plaintiff.

SUMMARY OF ARGUMENT

"Dues or membership fees" do not include annual fees paid by a member to a club for the privilege of playing golf, optional with the members and terminable at the end of the year.

The words must be strictly construed as this is an excise tax with nothing in the act except these words to indicate the intention of Congress; also because these words are being applied to a membership set-up and a method of charging for golf, substantially unchanged for 20 years before the passage of the first club dues tax in 1917.

"Dues" and "membership fees" are concededly synonymous. "Membership fees" mean "fees paid for membership."

Club dues in common understanding means the obligation the member assumes for his membership, the consideration for the membership, the obligation which recurs annually as long as the membership continues, regardless of how much or how little the member uses the club and its optional privileges, facilities, services or supplies.

The first reported case was *Weld v. Nichols*, in which dues or membership fees were defined as "definite obligations incidental to membership" and "applicable to all members of each particular class of membership," and the semi-annual golf fee was held not taxable. All the reported cases, except two involving the Merion Cricket Club are to the same effect.

The Treasury Department adopted this construction of the Act in 1926 when, shortly after the withdrawal of the Government's bill of exceptions in the *Weld* case, it deleted from the 1924 Regulations a statement that golf fees were dues. The Bureau followed this construction by making refunds, including one to the Merion Cricket Club. By the reënactment of the Act in 1928 with the same phraseology, Congress adopted this construction.

Until the Government's brief in *White v. Winchester* (to be argued immediately before the case at bar), neither the Treasury Department, nor the Bureau, nor the attorneys for the Government in any of the reported cases, have questioned the propriety of the definition laid down in the *Weld* case.

Of the three opinions of the court below Judge Jones' concurring opinion and Judge Maris' dissenting opinion both approved the *Weld* definition.

But Judge Jones, in applying the definition, disregarded the membership set-up fixed by the by-laws and held the golf fees to be dues because the playing of golf represented a large permanent investment, set apart and segregated as to upkeep and management—directly contrary to the *Weld* case and to the other reported cases.

We will not attempt to discuss Judge Clark's opinion in summary form, except to say that he disapproves of all

the reported cases and his definition of "dues or membership fees" is entirely novel.

ARGUMENT

ANNUAL FEES PAID BY MEMBERS TO A CLUB FOR THE PRIVILEGE OF PLAYING GOLF, OPTIONAL FOR THE MEMBERS AND TERMINABLE AT THE END OF THE YEAR, ARE NOT CLUB DUES.

Section 413 of the Revenue Act of 1928, quoted in full in the Appendix, imposes a tax of 10 per cent. on any amount paid to a club as "dues or membership fees."

This is an excise tax, one of the so-called luxury taxes. Of the numerous payments by members—for their membership, for various kinds of privileges or facilities to be enjoyed for long or short periods, or for services or supplies furnished, only one kind of payment has been selected by Congress for taxation—i. e., dues. There is nothing in the subject matter of payments by members to a club to indicate what kind of payments are most appropriate for taxation as luxuries. A tax on all such payments could be collected by the clubs as easily as those of one particular kind.

An excise tax having so narrow and specific a subject is plainly distinguishable from the income tax where Congress has intended to tax all the income of the taxpayer unless specifically exempt. In the case of the narrow excise, there is no guide to the scope of the tax except the literal meaning of the words used, whereas in the case of the income tax, the general purpose and spirit of the act furnish a background which compels an all-inclusive construction of its language (*Helvering v. Clifford*, 309 U. S. 331).

The membership set-up of the Merion Cricket Club as shown by its by-laws has been substantially the same since 1892 (R., 34). It acquired its first golf course in 1896, and since then has furnished golf privileges for its members by the payment of an optional fee in the same manner as is now done (R. 31, 32). This was twenty years before the tax on club dues was first imposed in 1917. (Revenue Act of 1917, 40 Stat. 300, Sec. 701.)

In the Appendix we will analyze the by-laws to show how unequivocally they distinguish the dues from the golf fees, and the privileges which the members of each particular class of membership obtained by the payment of dues, from the golf privileges obtained by the payment of the golf fees.

In 1917 when the dues tax was first imposed, there were doubtless many other clubs with membership set-ups and optional annual golf fees like Merion's, and the meaning of club dues must be construed with regard to such preëxisting arrangements.

This is exactly the reverse of so many cases which we see in the reports, where it is evident that the taxpayer's set-up of his personal finances has been made to fit in with the technicalities of some exemption. It is such cases that have led the courts to give such broad construction to tax statutes. The reasons for departing from the old rule that a taxing act will be strictly construed, entirely fail when the Court is construing an excise tax as applied to a financial set-up which existed twenty years before the tax was thought of.

The tax is imposed on "dues or membership fees." We understand that the Government concedes that these are synonymous. In the opinion in *Foran v. McLaughlin*, 59 F.(2d) 158, 160 (infra), it is stated:

> "Counsel agree that the terms 'dues' and 'membership fees', as used in the statute, are 'synonymous' and 'convertible'."

"Dues" is the significant word but "membership fees" has the same meaning.

A membership fee is a fee paid for membership. The word "fee" is often used after a noun to indicate the amount paid for it. An admission fee means the amount paid for admission. A license fee is the amount paid for a license. In the same manner we say tuition fee, passport fee, registration fee, examination fee, etc.

So we say a golf fee, or a skating fee, or a locker fee.

This is a very usual way of using the word "fee." A membership fee means the consideration paid for membership. This is precisely what we contend is the meaning of "club dues."

The commonly accepted meaning of "club dues" seems clear. When a man considers joining a club the first question he asks is: "What are the dues?" He knows that the dues represent the minimum that the club will cost him. He knows that if he is flush and likes the club, he will spend additional money on the various special privileges, facilities, services and supplies furnished by the club; but he also knows that if he gets hard-up, he can cut down on these expenses or entirely stop them, and still remain a member.

If he wants to know just what privileges he will enjoy without any payment beyond the dues, he examines the by-laws and ascertains the privileges of the class of membership which he considers joining. He knows that by joining the club he assumes an obligation to continue to pay the dues as long as his membership lasts—an obligation that recurs from year to year until he resigns, is expelled or dies.

If he is considering joining the Merion Cricket Club and wants the ladies of his family to have the use of the club, he finds he must join the Family Membership Class for which he will pay $120 per year, and that if the ladies find that they have no use for the club, he cannot transfer to a less expensive class.

He has found that the $120 per year is the consideration he pays for his family membership, that the obligation to pay it is incidental to his membership and is applicable to all the members of the Family Class, and that the obligation recurs as long as his membership lasts.

If he is a golfer and over 21 years of age he finds that he can play golf at $110 per year and that he can play one year and not play the next and resume playing whenever he feels like it. The $110 obligation does not recur if he does not desire to play for another year. If he stops playing golf and paying $110 per year, it has no effect on his membership. The $110 is the consideration he pays for the right to play golf. The obligation is not incidental to his membership.

We confidently submit that these considerations lead directly to the distinction between the nature of the $120 paid for Family Membership in the Merion Cricket Club and the $110 paid for the golf privilege; and that the distinction arises out of a difference in substance and not mere form and is entirely independent of the fact that the $120 is *called* the "dues" and the $110 is *called* the "golf fee" in the Merion by-laws.

The golf fees of 6 other clubs have been held not to be club dues in the following cases under the same reasoning.

Weld v. Nichols, 9 F. (2d) 977, Mass. 1925).

This is the first reported case on the subject.

In this case a member of the Brookline Country Club sued to recover a tax on a semi-annual golf fee collected from him by the club and paid to the collector under Section 501 of the Revenue Act of 1924 (43 Stat. 321). The by-laws of the club provided for six classes of membership and for the qualifications and privileges and the amount of the dues for each class of membership. The "golf rules" of the club provided that for the privilege of playing golf members should pay $1 per round, or $7.50 semi-annually, payable April and September. It was stipulated that some members paid $1 per round, some paid for six months, some paid for a year, and a minority did not play golf at all. The Government argued that taxable club "dues" included any payment by a member to a club which covered the use of a privilege for any substantial "period of time"; and that, therefore, while a casual or occasional payment was not taxable, a fee for the enjoyment of any privilege or facility over a relatively longer period was taxable. This argument was flatly rejected by the court.

The opinion lays down two definitions of dues or membership fees:

1. "Definite obligations incidental to membership in the club"; and

2. "Fixed and definite charges applicable to all members of each particular class of membership."

In discussing the Treasury Regulations (Appendix, p. 36) and the practice of the department the Court said:

> "Moreover, the practice of the department is difficult to reconcile with the present contentions of the government, or with any definite principle of interpretation of this section. The department does not tax charges for

golf by the day, nor for rooms by the week, or board by the week."

Foran v. McLaughlin, 59 F. (2d) 158, cert. den. 287 U. S. 637 (C. C. A. 9th, 1932).

This case dealt with the monthly fees paid by members of the Olympic Club of San Francisco who held "Contributing A Member" privileges to play golf. These privileges were not governed by the by-laws and the evidence consisted of circulars, resolutions of the board and the golf committee and oral testimony by the president of the club. It appeared that in order to finance the construction of a new golf course, the board issued a circular stating "it is planned to create a class to be known as 'Contributing Members' ". A payment of $275, afterwards increased to $1000, entitled the member to a class A or a class B privilege at his option. The class A privilege required the member to pay a monthly fee of $4, the fee involved in the case. A class B privilege entitled the member to play by paying daily green fees.

The by-laws provided that members were elected by the Board and the evidence contains a number of extracts from the minutes of the Golf Committee recommending golf players to the Board for election. One of the usual forms of the minutes was that the Committee "recommends that the following be elected to Class A Contributing membership in the Olympic Club. . . ."

It was held that the $4 fees were taxable as dues. The court, in distinguishing *Weld v. Nichols*, supra, stated:

> "That case involved an 'additional fee' of $7.50 for the privilege of playing golf for six months, on which fee a tax of 75 cents was assessed. The report of

the case does not disclose whether the club member holding the golf privilege was or was not compelled to pay the 'additional fee' for another six months at the close of the first six-month period. It is not shown whether the member would have been absolved from paying the six-month fee in case he had decided he did not desire to play golf during the ensuing semester. In other words, the printed record of the Weld case, supra, is silent as to whether or not the member's obligation to pay the fee was a fixed and *recurring* one, and one that carried with it contractual liability. As will be seen presently, the appellant's obligation was of this latter kind."

The opinion then shows by specific instances from the minutes that the liability to pay $4 per month was not terminable at the option of the club member. While some of the minutes indicated that a member might have been granted a release if he had paid for "at least" twelve consecutive months, the court assumed that this was a matter of grace which could be withheld by the club and that liability recurred into the future over an "indefinite period of time." The court's opinion concludes (p. 161):

"The foregoing excerpts from the minutes clearly indicate that, by whatever name these Class 'A' memberships were called, they entailed upon their holders a fixed, contractual liability to pay monthly green fees, regardless of their desire to continue to use the greens. Assuredly, these so-called 'fees' were not for a single, casual and occasional privilege—like a chance meal at the country club dining room—but represented a *recurring, contractual* obligation, extending over an indefinite period of time, and, in the language of the Weld case, supra, 'incidental' to a 'particular class of membership.' We therefore believe that these 'fees' were properly taxed."

It will be seen that there was substantial evidence that the club itself intended these "Class A Members" to constitute a class of membership, a fact entirely absent in the *Weld* case (supra) and in the case at bar. But the Court considered the critical fact to be that the obligation to pay the monthly fee could not be terminated but was an indefinitely recurring one. And the Court approved the *Weld* case on the assumption that Weld could have terminated his liability if "he had decided he did not desire to play golf during the ensuing semester."

In every subsequent case the Government approved the *Weld* definition but used the instant case to sustain its argument that those members who paid the golf fee constituted "a particular class of membership."

This argument required the overruling of the *Weld* case and is directly contrary to the reasoning of the instant case. It was rejected in the following cases.

Baltimore Country Club v. U. S., 7 F. Supp. 607 (Md. 1934). This was another case of an annual golf fee. The opinion quotes the *Weld* definition and states that the golf fees

> "are not taxable, because they are not based upon membership. They are not assessed upon any group or class of members because of membership."

Williamson v. U. S., 12 F. Supp. 26 (Western North Carolina, 1934). This case involved the semi-annual golf fees of the Charlotte Country Club. The court cited with approval both the *Weld* definitions, distinguished these golf fees from dues on the ground that the latter "must be paid in order to retain membership in the club" and decided that the golf fees were not taxable.

Philadelphia Cricket v. United States, 30 F. Supp. 141 (Eastern Pa. 1939). This case held that the annual golf fees were not club dues.

White v. Winchester Country Club, 117 F.(2d) 146. This is the case now pending before this Court on certiorari. This case approves both the *Weld* definitions.

These six cases are all the reported cases except the case at bar and *Hardt v. McLaughlin*, which also involved the Merion golf fees and which we will discuss later.

THE VARIOUS MEANINGS WHICH HAVE BEEN GIVEN TO THE WORDS "DUES OR MEMBERSHIP FEES" BY THE TREASURY DEPARTMENT AND THE BUREAU OF INTERNAL REVENUE.

1. In 1925, when the *Weld* case was decided, the Treasury Regulations, revised September 1924, Article 9, pp. 10 and 11 (Appendix, p. 36), contained the following:

> "So, also [subject to the tax] are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

and among the examples:

> "(7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured by the member's family. A payment of this extra $10 is taxable as a membership fee."

We believe that the only charges for the privilege of using additional facilities, on which the Government ever

attempted to collect the dues tax, were golf fees. With the Merion Cricket Club, the testimony shows (R. 35, 36) the following charges on which the tax was never collected:

> "Locker-room five dollars a year; use of skating pond, five dollars a year; care of a sedan car in the garage, $22.50 per month; sleeping room in the clubhouse, $55. a month."

The opinion in the *Weld* case refers to the fact that "The department does not tax charges for golf by the day, nor for rooms for the week, or board by the week." This was one of the reasons why the Court did not consider itself bound by the Regulations we have just quoted. If the Government did not follow its own regulations, the courts were under no obligation to do so.

2. On May 21, 1926, two months after the Government withdrew its Bill of Exceptions in the case of *Weld v. Nichols* (discussed supra), a new revision of the Treasury Regulations (Appendix, p. 36) was promulgated, in which the above quoted paragraphs were deleted. If the Government intended to accept the construction laid down by the *Weld* definitions and make refunds to other clubs, this action was necessary, as the existing Regulations were in direct conflict therewith.

This deletion was an unequivocal announcement that the Treasury Department construed "dues or membership fees" not to include extra charges for the privilege of using additional facilities, or annual golf fees, or extra fees for the privilege for the member's family to skate on the club's rink.

The adoption of this construction was followed by the making of refunds when the facts were similar to those in the *Weld* case (R. 20, 21). These refunds included one to

the Merion Cricket Club made on March 13, 1928, because the claim "represents taxes on extra charges collected from members for the privilege of using the golf course" (R. 33). These words of the Deputy Commissioner are almost identical with the wording of the deleted portion of the previous Regulations.

On May 29, 1928, the Revenue Act of 1928 (the Act here involved) was approved (Appendix, p. 35), using the same words as those in the Revenue Act of 1924 which was the Act construed in the *Weld* case.

By the reenactment of the Act of 1924 in the same words, Congress adopted the construction, which had been placed upon these words by the Treasury Department (i. e., that they did not include an annual golf fee) and which had been followed by the Bureau in administering the Act.

The leading case on this principle is *United States v. G. Falk & Brother*, 204 U. S. 143 (1907). Falk imported tobacco after the date of the passage of the 1897 Tariff Act and stored it in a bonded warehouse. When he withdrew the tobacco it had lost considerable weight by the evaporation of moisture. The Collector assessed the duty upon the weight of the tobacco at the time of *entry;* Falk contending that it should be assessed upon the weight at the time of *withdrawal.*

The Board of General Appraisers and the Circuit Court affirmed the action of the Collector. The Circuit Court of Appeals for the Second Circuit reversed the decision. The Government appealed to the Supreme Court, which reversed the decision of the Court of Appeals, holding that the duty was properly assessed on the weight at the time of *entry.*

The Customs Administrative Act of 1890, as amended by the Act of 1902, provided that the same rate of duty

should be collected on goods removed from a bonded warehouse as if the goods had been imported at the time of their withdrawal and the Circuit Court of Appeals held that this act was controlling and that the duty on Falk's tobacco should have been assessed on its weight at the time of withdrawal.

The Government contended that Section 33 of the Tariff Act of 1897 changed this rule and imposed the duty on the weight at the time of *entry*. This Section, so far as material, is as follows:

> "That on and after the day when this Act shall go into effect all goods . . . previously entered without payment of duty and under bond, . . . shall be subjected to the duties imposed by this Act . . . upon . . . the withdrawal thereof; Provided that when the duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

It will be seen that the main provision of this Section of the Act of 1897 applies *only* to goods entered *before* the passage of the Act and could have no application to Falk's tobacco which was entered after its passage. The general rule is that a proviso applies only to the subject matter of the section to which it is appended; and Falk contended that the proviso had no application to his merchandise and that the duty should have been levied on the weight at time of withdrawal in accordance with the Customs Administrations Act of 1890.

The Government contended that the proviso was general and applied to all goods whether imported before or after the enactment of the Tariff Act of 1897.

It appeared that Section 50 of the Act of 1890, which

preceded the Act of 1897, was substantially the same as Section 33 of the Act of 1897. The first part of Section 50 of the Act of 1890 applied to merchandise imported before the effective date of that Act and the proviso was precisely the same as the proviso in the Act of 1897, except that the last word of the proviso in the Act of 1897 was "withdrawal", instead of "entry" as in the Act of 1890. The Attorney General had rendered an opinion upon the Act of 1890 in which he held that the proviso assessing duties upon the weight of the merchandise at the time of its withdrawal was of general application and applied not only to merchandise imported *before* the effective date of the Act but also to merchandise imported *after* the effective date of the Act. The executive officers of the Government followed this construction until the passage of the Act of 1897.

Mr. Justice McKenna in delivering the opinion of the Court said (page 149):

> "The construction made by the Attorney General is disputed, as applicable to section 33 of the act of 1897, and it is urged that the whole scope and meaning of that section, when reduced to its simplest terms, make goods theretofore entered under bond for warehouse subject to the duties imposed by the act upon the withdrawal thereof, when the section is construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. This may be conceded to be the primary purpose of a proviso, but a presumption of such purpose can not prevail to determine the intention of the legislature against other tests of meaning more demonstrative. We said in *United States v. Whitridge*, 197 U. S. 135 (p. 143): 'While no doubt the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed.' And the Attorney General's opinion

> can not be overlooked. The proviso which he construed in section 50 of the act of 1890 was reënacted in section 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed."

And he concluded the opinion as follows (page 152):

> "This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse."

It will be seen that in the case at bar we have the three conditions which this case considered necessary to show that Congress has adopted the construction for which we are contending.

1. The Treasury Department's construction of the meaning of "dues or membership fees" in the Act of 1924, that these words did not include extra charges for additional privileges such as $60 per annum for the privilege of using the golf links, by the deletions in promulgating the Regulations of May 21, 1926.

2. The refunds allowed where the facts were similar to the *Weid* case, including the refund to the Merion Cricket Club.

The *Falk* case has been cited by this Court with approval many times and the principle enunciated has never been modified or questioned.

In *U. S. v. Hermanos*, 209 U. S. 337 (1908), opinion concluded as follows (p. 339):

> "And we have decided that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."

In *National Lead Co. v. U. S.*, 252 U. S. 140, the Court said (p. 146):

> "the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed."

In *U. S. v. Dakota-Montana Oil Co.*, 288 U. S. 459 (1933), the Court said (p. 466):

> "The administrative construction must be deemed to have received legislative approval by the re-enactment of the statutory provision, without material change."

In *Helvering v. Winmill*, 305 U. S. 79 (1938) this Court said, in an opinion by Mr. Justice Black (p. 83):

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law."

It is hard to understand the Government's reference, in its brief in the case of *White v. Winchester Country Club*, No. 63 of October Term, 1941, to the deleted portions of the Regulations of September, 1924. On pp. 10 and 11 the dele-

tions are quoted and are immediately followed by this statement:

> "Against the background of these regulations, the Revenue Act of 1926 was adopted and subsequently enlarged in 1928. A construction of the statute in harmony with the pre-existing regulations is therefore justified."

The Revenue Act of 1928 was *not* adopted against the background of these provisions of the 1924 Regulations, because they were deleted from the Regulations in 1926, two years before the Act of 1928 was adopted.

As to the Revenue Act of 1926, approved February 26, 1926, we are not interested in taxes on golf fees paid between its date and May 21, 1926, when the new Regulations were approved. And the testimony shows (R. 33) that the Bureau refunded to the Merion Cricket Club the taxes on the golf fees collected up to May 18, 1926, and continued making refunds of the taxes on similar golf fees until the case of *Foran v. McLaughlin*, 59 F. (2d) 158 (discussed supra), was decided (R. 21).

The Government certainly does not contend that *Helvering v. Winmill* (supra), requires a statute to be construed "in harmony with pre-existing regulations" which were repealed two years before the statute was adopted.

The Revenue Act of 1926 is significant because it was passed by Congress and was approved by the President, between December 30, 1925, when the judgment was entered in the *Weld* case, and March 23, 1926, when the Government withdrew its bill of exceptions. The experts of the Bureau of Internal Revenue were surely engaged contemporaneously in advising the Commissioner whether "dues or membership fees" included annual golf fees, and in advising the

Committees of Congress as to the phraseology of the new Revenue Act.

3. The third change in the Government's treatment of dues or membership fees occurred when they ceased to make refunds in cases similar to the *Weld* case. This followed the decision in *Foran v. McLaughlin* (R. 21). We have shown that, following that case, the Government consistently approved the *Weld* definitions but argued (unsuccessfully except in the two Merion cases) that the members who paid golf fees constituted "a particular class of members."

The decisions of the Bureau have also approved the two *Weld* definitions.

Internal Revenue Bulletin Vol. IX, No. 2, contains at p. 414 an opinion of General Counsel of the Bureau discussing dues and membership fees, which was prepared January 14, 1930 (R. 21). The opinion refers to the *Weld* case and quotes the two definitions with approval: "definite obligations incidental to membership in the club" and "fixed and definite charges applicable to all members of each particular class of members."

On September 27, 1930, the Deputy Commissioner in a letter to the Collector in Philadelphia (R. 22) informed the Merion Cricket Club that the previous ruling that its golf fees were not club dues (the ruling when the refund was made) had been reversed. On May 4, 1931, the Deputy Commissioner wrote to Bromley, Evans & Staples (R. 24), counsel for the club, that our protest against the letter of September 27, 1930, had been referred to General Counsel for a specific ruling. The letter again approves the two definitions from the *Weld* case.

On August 26, 1931, the Commission wrote to Frank M. Hardt (plaintiff in the case of *Hardt v. McLaughlin*,

discussed infra) (R. 26) rejecting his claim of refund. This letter again cites the *Weld* case and quotes with approval the two definitions.

In none of the briefs filed in the reported cases (and we believe we have read all of them) have the Government's attorneys questioned or attacked the *Weld* definitions.

We can assert without fear of contradiction that from May 21, 1926, when the deletions were made from the Treasury Regulations, until the filing of the Government's brief in *White v. Winchester*, No. 63 of October Term, 1941, the various executives of the Government administering the Revenue Acts have approved the definition of dues and membership fees given by the *Weld* case.

And although the Government has been resisting the paying of refunds for more than 11 years, by arguing that annual golf fees, optional for the members and terminable at the end of the year, were club dues, the Regulations have remained the same, and the Treasury Department has never changed its authoritative and unequivocal declaration that "dues or membership fees" did *not* include "extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

4. The latest change in the Government's handling of dues or membership fees was brought about by its brief in *White v. Winchester Country Club* now before this Court.

The only authority for the new theory is the opinion of Judge Clark in the case at bar (discussed infra).

As the reason for presenting a new definition after 15 years, the Brief states (p. 11):

> "An examination of the cited cases fails to reveal substantial consistency among the courts with respect to the meaning to be given to the term 'dues or membership fees.' "

This we deny. *All* the courts and *all* the individual judges, except Judge Clark, and also the Bureau have agreed that the words mean "definite obligations incidental to membership" or "fixed and definite charges applicable to all members of each particular class of membership." (Two out of the three judges of the Circuit Court of Appeals for the Third Circuit agreed to this definition.)

In the case of six of the seven clubs involved in the reported cases, it was held those members who paid a periodical golf fee, optional for the members and terminable at the end of the period, did not constitute a "particular class of members."

Judge Kirkpatrick agreed to this in 1939 in one case (*Philadelphia Cricket Club v. United States*, supra), although, several years before, he had disagreed with it in *Hardt v. McLaughlin* (infra).

In the Court below in the case at bar, one judge agreed and one disagreed and Judge Clark thought all the cases lacked logic.

Before discussing the three opinions in the Court below we would refer to *Hardt v. McLaughlin*, 25 F. Supp. 684 (Eastern Pa., 1936). This case also involved the golf fees of the Merion Cricket Club and the case at bar was tried on the testimony of this case.

Judge Kirkpatrick decided that the golf fees of the Merion Cricket Club were taxable. No appeal was taken from the judgment. Judge Kirkpatrick said that the golf fees carried

> "the privilege of using substantial portions of the club property, often representing a large permanent investment and rather definitely set apart and segregated as to upkeep and management."

He quoted with approval the definition of the *Weld* case "fixed and definite charges applicable to all members of each particular class of membership." The opinion then continues:

> "In the case at hand it is true that the by-laws divide the Merion Club membership into nine classes, and that golf-playing members are not mentioned in the classification as distinct from any other class, but I cannot see any reason why members who have acquired the right to play golf on the club links—a right which club members do not have by virtue of their membership—by paying a regular additional annual assessment are not just as much a class of members as those, say, who by paying more than the minimum regular dues get the right to have admission cards issued to the ladies of their immediate families which entitle the ladies to all the privileges of the grounds and the main club house ('family members' in the classification made by the by-laws)."

In short, the case decides that those members who pay the golf fee constitute a "particular class of membership." The above quotations from the opinion are just as applicable to golf fees in the *Weld* case as to the golf fees of the Merion Cricket Club. They are also applicable to the golf fees of the Philadelphia Cricket Club, which Judge Kirkpatrick later held were not taxable. (*Philadelphia Cricket Club v. U. S.*, 30 F. Supp. 141, supra.)

THE THREE OPINIONS IN THE COURT BELOW

Judge Maris' dissenting opinion is a clear statement of both the meaning of dues or membership fees and the application of the definition to the facts in the case at bar.

Judge Jones' concurring opinion adopts the opinion in *Hardt v. McLaughlin* thus approving its definition (originating in the *Weld* case) "fixed and definite charges applicable to all members of each particular class of membership." This definition therefore has the sanction of the majority in the Court below. This makes the courts which have considered this matter unanimous on this definition. And the judges are unanimous except for Judge Clark.

Judge Jones and Judge Maris differ on only one point. Judge Maris reasons that the members who constitute a "particular class of membership" should be determined from the membership set-up as shown by the by-laws. Judge Jones reasons it must be determined aliunde the by-laws, by the character of the privilege or facility for which the questioned payment is the consideration.

Judge Jones' opinion (and this applies equally to the opinion of Judge Clark) entirely disregards the fact that the words "dues or membership fees" appear in two other portions of the section, and must be given the same meaning each time they are used.

Section 501 (a) (1) provides that the dues or membership fees paid to a club are taxable only "if the dues or fees of an active resident annual member are in excess of $25 a year." Section 501 (c) provides: "In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assess-

ments, but shall pay no tax upon the amount paid for life membership."

Let us suppose the case of a more modest club whose by-laws provide for three classes of membership—Junior Membership $5 per year, Senior Membership $20 per year and Life Membership. The club gives its members the option of additional privileges or facilities such as playing tennis, skating, use of locker room, etc., at $2 per year each.

If the dues or membership fees of a Senior Member include not only the $20 but the special privilege fees he happens to pay (which is Judge Jones' decision), how would the club know at the beginning of the year when the dues are payable, whether or not to collect the tax on any of the dues, and how much to collect from the Life Members? And a Life Member who did not want any of the special privileges would have to pay the tax on all of them, if any Senior Member happened to use all the privileges.

This portion of our argument is not fanciful. It constituted one of the reasons why Judge Morton in the *Weld* case decided that golf fees were not taxable. And it is referred to in several of the other reported cases as material on the question.

The Government in its brief in *White v. Winchester C. C.* fails to find "substantial consistency among the courts with respect to the meaning to be given to the term 'dues or membership fees'" and states that the distinctions laid down by the courts are unreal. It is respectfully submitted that once we accept the *Weld* definitions and their application to a normal membership set-up such as is usually established by the by-laws, there is no inconsistency in the cases. It is only when we try to apply the statute without regard to the membership set-up as established by the by-laws that we find difficulty.

In regard to Judge Clark's opinion we confess that we are by no means sure as to its meaning. But we will first refer to his treatment of the two fundamental features of a case like this—the wording of the statute and the facts to which the words must be applied.

The critical words of the statute are, of course, "dues or membership fees." These words are referred to twice in Judge Clark's opinion and each time are misquoted as "membership dues and fees." This may be an unconscious error. But if when Judge Clark wrote the opinion, he thought that those were the words used by Congress and if he thought that the word "membership" modified dues and not fees (which we believe would have been correct), then Judge Clark's entire disregard of the membership set-up of the club is understandable, and his opinion much clearer.

There are only two references in the opinion to the *facts* of the case, and in each instance the facts are misunderstood.

1. The opinion commences by reference to two other attempts by clubs to escape the tax, and then states that the case at bar is one of a series arising out of the third move and that in furtherance of this move "the general dues are still lowered but the resulting deficit is met by the creation of a 'playing' membership." Of all the reported cases, we believe that Merion is the only club having a Playing Membership, and this must refer to us. Merion has had a Playing Membership since 1892. Playing Members are entitled to the athletic facilities of the Main Grounds but not to the use of the Main Club House or the Golf House (R. 12). They are not permitted to play golf at all (R. 15). The facts are therefore directly opposite from Judge Clark's understanding. And if the club *had* created a "playing

membership" to consist of those members who desired to play golf, then the annual payment for that membership would have been dues without question.

2. Merion permitted certain members not enjoying the annual golf privilege, to play under limited condition on payment of daily green fees which the Government never taxed (R. 19, 36).

A number of the reported opinions have stated that the Government was inconsistent in claiming the tax on golf fees for the privilege of playing golf for a month, for 6 months or for a year, and not claiming it on green fees for the privilege of playing for a day. The opinion denies this inconsistency and states:

> "The green fee is not an attempt to charge the appropriate fraction of a general cost. It is an arbitrary amount billed to *non-members* for the privilege of playing." (Italics ours.)

Here again Judge Clark is in error on the facts because Merion has never permitted a non-member to play by paying a green fee.

Judge Clark seems to have misapprehended not only the facts but the law. Certainly no fee paid by a non-member to a club could be either dues or a membership fee. (See the last paragraph of the Deputy Commissioner's letter of May 4, 1931 (R. 25)).

Perhaps Judge Clark thought the act read "membership dues and fees", in which case a fee paid by a non-member would have been taxable.

Judge Clark's understanding of the meaning of club dues seems to be as follows: From the derivation of the word "club" he concludes that "the theory is one of joint

expenditure." Some clubs carry this theory to its logical conclusion and divide the entire cost of running the club equally among the members as dues. But most clubs do not go to such lengths, but "apportion to the particular recipients [the cost of] certain supplies and services." The remaining cost of running the club comes from the members as "initiation fees" and "dues".

So far it is clear. Any payment for supplies or services, the cost of which is "apportioned" to the particular recipients who enjoy them, is not dues—all other payments are dues.[1]

But when we fit into this, the idea of a difference between "single and individual" enjoyment and "common and repeated" enjoyment, the problem becomes complicated.

One man likes to play the golf course all by himself and his enjoyment comes out of the "single and individual" use of the links. Others prefer to play with friends and get their enjoyment out of the "common use" of the links. And whatever enjoyment the golf player gets out of the golf facilities it seems to us to be the same whether he pays $5 per day or $110 per year.

And when we come to the "apportionment" of the cost the matter is still more confused. Apparently if the club apportions the cost to the particular recipient, the charge is not dues. If so, who will say that the charge for golf for a year is *not* an apportionment of the cost between the members paying the golf fees; and that the charge for golf for

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NOTE 1—This seems to us to be directly contrary to the Government's understanding of Judge Clark's opinion. In the Government's new definition (pp. 14 and 15 of its brief in *White v. Winchester Country Club*), a payment is not dues unless it "represents an apportionment of the cost of maintaining and operating that common facility."

a day *is* such an apportionment. We suppose that every club (and this is certainly true of Merion) in fixing the extra charges for facilities or privileges or services or supplies tries to be fair to those members who will use them and to those who won't. And this is just as true of the cost of a table d'hote dinner as of the golf fee.

Referring again to Section 501 (a) (1) and to our example of the club whose charge for Senior Membership was $20, we would be glad to know what meaning Judge Clark would give to the words "dues or fees of an active resident annual member", and whether the derivation of the meaning of the word "club" would enable him to give any meaning to those words without looking at the club's by-laws.

We doubt if many of the members of Congress who adopted the Act of 1928, or of the men who drafted the Merion by-laws in 1892 were as erudite as Judge Clark. But certainly most of them knew the difference between their club dues and their golf fees; and that their dues were the consideration they paid for membership and for those rights given by the by-laws to the particular class of membership to which they were elected; and that their golf fee was optional and terminable like any other additional charge.

It is respectfully submitted that the golf fees were not taxable and that the judgment should be reversed.

JOHN LEWIS EVANS,
WHITE & STAPLES,
Attorneys for Petitioner.

APPENDIX

THE REVENUE ACT OF 1928

Section 413 of the Act approved May 29, 1928, Ch. 852, 45 Stat. at Large 864 (see 26 U. S. C. A. (1940) §1710, Internal Revenue Code §1710, 53 Stat. Part 1, p. 192), is as follows:

"Club dues tax.—(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or

membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

TREASURY REGULATIONS 43 (1928 Rev.)

"ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, that the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an 'active resident annual member' of such club are in excess of $25 per year. 'An active resident annual member' is a member who is neither a life nor a non-resident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associate or other partial membership.

"The term 'dues' is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

"Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

"Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore not taxable."

The fourth paragraph is derived from Article 9 of Regulations 43 Revised May 16, 1926, which was approved shortly after the decision of *Weld v. Nichols*. This 1926 Revision deleted from the Revision of September 1924 certain portions inconsistent with the *Weld* decision. In the following quotation from the 1924 Revision we have italicized the portions deleted by the Revision of 1926:

"Art. 9. Dues or membership fees.

. . . . . .

"Where the dues or membership fees, determined in the manner herein outlined, of an active resident annual member are in excess of $10 per year, dues or

membership fees paid by other classes of members, whether or not they are in excess of $10 per year, are subject to the tax. *So, also are extra charges which are imposed upon members for the privileges of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links.* A 'greens fee' charged to a guest is not taxable, unless the right or privilege granted in return is for a period of time, such as a season. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the Act, and therefore not taxable."

Examples:

"Example 7. The members of a certain curling club pay annual dues of $20. By the payment of $10. extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee."

ANALYSIS OF BY-LAWS

Art. I, Sec. 1 commences (R. 10):

"There shall be the following Classes of Members".

This is followed by sub-paragraphs each providing for one of the ten classes of membership. The qualifications and privileges of the members of each class are set forth in detail. The introductory clause—"There shall be the following Classes of Members" originated in the by-laws of 1892, at which time there were seven out of the present ten classes (R. 34). Since that time there have been only minor changes

in the classes of members, except that the life membership is being abolished.

The phrases "classes of members" and "classes of membership" are used eight times in the by-laws (R. 10, 10, 11, 12, 13, 14, 15, 18). They are never used with an unnatural or forced meaning. Every time they are used, the context shows that they refer only to the classes into which the membership is divided by Art. I, Sec. 1, and that they could not refer to the members who are enjoying golf privileges or any other special privilege for which the member pays an additional periodical fee and which he can exercise and terminate at will.

The words "golf privileges", "golf facilities", and "privilege of playing golf" are used nine times in the by-laws (R. 14, 15, 15, 15, 15, 16, 17, 17, 17). They are used in their natural meaning and it is clear that the exercise of the golf privilege has no relation to the class of membership to which the member belongs.

The words "privileges of the club" and "privileges" of a specified class of membership are used eleven times in the by-laws (R. 10, 10, 11, 11, 12, 12, 12, 13, 14, 14, 14). Every time they are used, the context shows that they refer to the privileges which are "incidental to membership", *i. e.*, the privileges to which the member is entitled without the payment of any amount except his dues; and that they do not include the privileges of playing golf nor any other special privilege for which an additional charge must be paid.

The words "dues" and "golf fees" are used many times. There is no possibility of confusing the two. There is nothing in the by-laws to indicate that the essential characteristics of the two forms of member obligation are similar.

The evidence shows that for 20 years proprietary mem-

bers have paid the "golf fee" in spite of the provision in the by-laws and in the lease of the main grounds (R. 30 to 32) that as stockholders of the Haverford Land and Improvement Company they are "entitled to all the privileges of the Club, without the payment of entrance fee, annual dues or assessments".

"Resignations" of membership must be presented in writing to the Secretary (R. 16); notice of "withdrawal" from exercise of golf privileges must be given to the Treasurer (R. 15).

The by-laws require the treasurer to send to every member, upon receipt of his dues, "a card of admission, upon which shall be printed the privileges of the class of membership to which he belongs" (R. 17, 18). The cards of admission do not state whether or not the member is exercising the golf privilege (R. 36, 37).

The inception of the obligation to pay dues is by election by the committee on membership under detailed requirements (R. 15, 16). The inception of the obligation to pay the golf fee is not specially provided for by the by-laws. A printed form of application is provided (R. 18), but the practice is that no formal application is required, nor any approval by board, committee, or officer (R. 35).

The by-laws permit a member, under specified conditions, to transfer from certain classes of membership to certain other classes. But no transfer is permitted where the member's dues will be decreased, except when he is elected by the club to honorary membership, or becomes entitled to proprietary membership by the purchase of Haverford Land and Improvement stock under the provision of the lease of the main grounds (R. 10, 14). Liability for the golf fee can be terminated at will.

The golf fees have so little relationship with the dues and the classes of membership, that Art. II, Sec. 2, 1-a (R. 17) which fixes the amounts of the golf fees uses the word "Juniors" to mean boys under 21 years of age, while "Junior Membership" is for boys under 16 (R. 13).

No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1941

MERION CRICKET CLUB, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 83

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Although we believe the decision below to be correct, we do not oppose the granting of the writ.

The question presented is whether certain annual fees paid by members of the petitioner manifesting a desire to use its golf facilities are taxable as "dues or membership fees" of a social, athletic, or sporting club, within the meaning of Section 413 of the Revenue Act of 1928 The decision below, as asserted by the petitioner, is probably in conflict with *White* v. *Winchester Country Club,* 117 F. (2d) 146 (C. C. A. 1st), in which this Court granted the Government's petition for

a writ of certiorari on May 26, 1941, No. 1004, 1940 Term.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

JUNE 1941.

No. 83

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OCTOBER TERM, 1941

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 51–52) is not reported. The opinions of the Circuit Court of Appeals (R. 54–61) are reported in 119 F. (2d) 578.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 28, 1941 (R. 61). The petition for a writ of certiorari was filed May 12, 1941, and was granted October 13, 1941. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether annual fees paid by members of the Merion Cricket Club for the privilege of using its golf facilities constitute "dues or membership fees" subject to the tax imposed by Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations will be found in the appendix, *infra*, pp. 13–16.

STATEMENT

During the period from July 1, 1931, to June 30, 1935, the Merion Cricket Club paid to the Collectors of Internal Revenue then in office amounts allegedly totaling $18,690.29[1] as taxes on the annual golf fees received from its members. The taxes were said to amount to ten percent of such fees, and were collected as "dues or membership fees" under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928. (R. 3, 5.)

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[1] This is the amount stated in the complaint. However, a footnote indicates that this figure should be amended to read $18,048.62. It was stipulated at the trial that the computation of the exact amount to be refunded would not be made unless the right of the petitioner to any refund was ultimately sustained (R. 7–8).

The membership of the Club was divided into ten classifications (R. 10–14); only Proprietary Members (R. 10), Life Members (R. 11), and Honorary Members (R. 14) were not required to pay regular dues (R. 17).[2] Honorary Members had the privilege of using the golf courses merely by virtue of their status as members (R. 14); the only dues-paying members exempted from the payment of annual golf fees were the owners of $1,000 of the stock of the Merion Cricket Club Golf Association (R. 15). All other members[3] who wished to play golf, including Proprietary Members, who owned stock in the company which held title to the land occupied by the Club, and Life Members, were required to pay, "in addition to the other dues or sums for which they are annually liable, further fees for the privilege of playing golf" (R. 10–12, 15, 32). Members electing to play golf continued to be liable for the succeeding year unless they gave notice of withdrawal before the end of the year (R. 15, 16). As in the case of all dues, golf fees were payable on the first of January and the first of July, and persons admitted to golf privileges or membership after July 1 in any year were

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[2] Whether Army and Navy Members were required to pay regular dues is not entirely clear. Compare R. 14 with R. 17.

[3] Persons belonging to the class known as "Playing Members" were not allowed golf privileges (R. 39). "Women having the privileges of the Club" could acquire the privilege of using the golf facilities upon payment of the annual golf fees (R. 15).

entitled to remission of one-half of the annual fees or dues (R. 17). A golf player was not entitled to a proportionate refund if he stopped using the golf facilities during the year (R. 45).[4]

The golf fees[5] were set forth in Article II of the Club's bylaws (R. 16–19). This article also listed the dues to be paid by the members in the various classifications and by women having the privileges of the Club (R. 17). Those desiring to use the golf facilities were required to pay a golf entrance fee of $100 upon admission to this privilege[6] (R. 16). The annual golf fees ranged from $30 for persons under 21 years of age to $110 for men 21 years of age and over (R. 17); the amount of the fee was not dependent upon the class of membership to which the golf player belonged (R. 14–15). Payment of the annual golf fees entitled members to use the golf facilities as often as they desired without further charge. They could permit their wives and guests to use the golf course, in their company, not more than four times in a

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[4] Between 1921 and 1932, when there was a large waiting list for golf privileges, the Club by resolution adopted a policy of permitting golf players to withdraw during the year and to receive a pro rata refund if another member was ready to fill his place (R. 44). This policy was abandoned by resolution adopted February 24, 1932 (R. 44–45).

[5] Until 1929, the golf fees were designated as golf "dues" in the bylaws (R. 19, 44).

[6] Persons who were members of the Club on December 1, 1923, and who had remained members continuously until the date of obtaining golf privileges were exempted from payment of the golf entrance fees (R. 16–17). Whether or not the entrance fee is subject to the tax is not in issue here.

year without paying a further fee. In addition, they could request the occasional issuance of a card entitling a guest residing more than 25 miles from the club to use the facilities for ten days. (R. 18.)

The number of members who could obtain annual golf privileges was limited in the bylaws to 540 or such greater number as the Board of Government might prescribe from time to time[7] (R. 14). When the quota of those admitted to golf privileges was filled, members on the waiting list for admission to such privileges could use the golf courses by payment of daily green fees amounting to $3 and $5 per day (R. 19). Thus, even members entitled to "all the privileges of the Club" paid additional fees for golfing privileges and for the use of certain other facilities (R. 39). The use of a billiard table, squash court or ballroom could be obtained by payment of a fixed charge for each use (R. 35–36).

After a claim for refund of the amounts alleged to have been paid to the Club to cover the taxes on the annual golf fees had been duly filed and rejected (R. 3), the Club on its own behalf and on behalf of its members[8] instituted suit against the United

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[7] Persons who were members of the Club on December 7, 1912, were not subject to this restriction. Playing, Active and Junior Members and women were permitted to exercise golf privileges only in such numbers and on such terms as the Board of Government might prescribe. (R. 14–15.)

[8] Although the record does not show it, the Club filed with the Bureau of Internal Revenue powers of attorney executed by the members on whose behalf the suit is brought, in accordance with Article 54 of Treasury Regulations 43 (revised June, 1932) promulgated under the Revenue Act of 1926, as amended by Revenue Acts of 1928 and 1932.

States for the recovery of the total amount claimed to have been paid (R. 3).[9] The District Court entered judgment for the United States (R. 53). An appeal was taken, and the Circuit Court of Appeals for the Third Circuit affirmed the judgment of the District Court (R. 61).

SUMMARY OF ARGUMENT

Since the Revenue Act of October 3, 1917, a federal excise tax has been imposed on "dues or membership fees" paid to any social or athletic club. Except for the general provision in the 1928 amendment to the Revenue Act of 1926 that "the term 'dues' includes any assessment irrespective of the purpose for which made," the terms "dues or membership fees" have never been defined by statute. Earlier regulations, however, had specified that "dues or membership fees" included extra payments made by club members when by these payments the members or their families acquired the right to the repeated use of club facilities over a period of time.

Those courts which have passed upon the issue of what are "dues or membership fees" have been in substantial disagreement in respect of both results and applicable tests. But a recognition of the basic nature of club operations furnishes a working test for identifying payments which should be in-

[9] An earlier suit by an individual member of the Club, involving the same questions as in the instant case, resulted in judgment against the member (R. 6). *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (E. D. Pa.).

cluded within the statutory terms. In general, any payment made by a club member for the right to the repeated and general use over a period of time of a common facility of the club should be considered to be an amount paid as "dues or membership fees," if the amount of payment is not fixed by each occasion of actual use but represents an apportionment of the cost of maintaining and operating that common facility. Under this general definition, the disputed payments in the instant case were taxable as "dues or membership fees."

ARGUMENT

The issue in this case is whether the annual fees paid by some of the members of the Merion Cricket Club for the privilege of using the Club's golf facilities are taxable as "dues or membership fees" under Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, appendix, *infra*, pp. 13–14. The question is in all material respects identical with that presented in *White* v. *Winchester Country Club*, No. 63, present Term. The position of the Government is presented at length in the Brief for the petitioners in that case, and the Court is respectfully referred to that brief for the historical and theoretical bases of the argument that the fees involved in both cases should be held taxable under the statute.

Although the systems of charging for admission to golf privileges in the two clubs differed slightly, the reasoning in the brief in the *Winchester Coun-*

try Club case is clearly applicable to the facts of this case.[10]

Both clubs permitted the members to use the golf facilities only upon payment of extra dues or fees. In both cases the payments entitled the members to make repeated and general use over a period of time of a common facility of the clubs, and the amount in no way depended on the number of occasions of actual use. Like the dues paid for the privilege of admission to the clubs as a member, these fees represented an apportionment of the cost of maintaining and operating one of the clubs' com-

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[10] The confusion in the bylaws between dues admitted to be taxable and fees for "privileges" claimed to be tax-free which marked the *Winchester* case (see petitioner's briefs, pp. 17–19) is, perhaps, less apparent in the instant case. But some confusion persists. See *infra*, pp. 9–10. And in the instant case, those with golf privileges were known as "golf members" (R. 38). Thus even if the test of applicability of charges to "all members of each particular class of members" were utilized, the golf fees in the instant case should realistically be subject to the tax. Cf. *Weld* v. *Nichols*, 9. F. (2d) 977 (Mass.); *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (E. D. Pa.); *Baltimore Country Club* v. *United States*, 7 F. Supp. 607 (Md.).

And, indeed, in contrast to the *Winchester* case (see petitioner's brief, p. 5, and the concurring opinion in the instant case (R. 58–59)), the payments here in controversy would be taxable even under the rule, which we do not contend should be applied, which hinges taxability on whether privileges can be dropped by giving notice *before* or *after* the beginning of the year. Compare *Hardt* v. *McLaughlin*, *supra*, with *Philadelphia Cricket Club* v. *United States*, 30 F. Supp. 141 (E. D. Pa.).

mon facilities.[11] The golf fees, thus, are clearly different in kind from the payments made by the club members of forty cents for the use of a squash court for forty minutes, or sixty cents an hour for the use of a billiard table (R. 36). In these cases, it is plain that the amount of payment is fixed by each occasion of actual use.

The peculiar organization of the classes of membership of the petitioner herein adds force to the Commissioner's position. The membership of the Club is divided into ten classifications.[12] Each class carries with it slightly different privileges and calls for payment of correspondingly different annual dues. For example, a Senior Member pays annual dues of $100 (R. 17) and is entitled to "all the privileges of the Club", but may not obtain cards of admission for the female members of his immediate family (R. 12). Family Members, paying annual dues of $120 (R. 17), also have all the regular privileges and may in addition obtain cards of

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[11] The President of the Merion Cricket Club testified that a yearly fee is fixed for golf because a golf course is a "continuing source of cost"; the golf courses must be maintained "in good order all the year around, and for that reason we don't care to have a man give it up" (R. 39–40).

[12] Petitioner asserts (Br. 39) that liability for membership dues differ from liability for golf fees in that liability for the latter can be terminated at will, while no transfer from one class of membership to another is permitted where the member's dues will be decreased. But there is no showing in the record that a member cannot pass to a lower class just as a golf member can drop his golf privileges.

admission for the female members of their immediate families (R. 12). A Senior Member may become a Family Member merely by payment of the additional $20 annual dues (R. 12). There is no claim that this additional sum paid by a Senior Member for the enlarged privileges accompanying his entry into Family membership is not properly taxed as "dues or membership fees". No logical distinction for tax purposes can be drawn between this payment and the payment of an extra $110 which the same member must pay for the special privilege of using the golf facilities for a year. In both cases the quantum of privileges is the measure of the charges to be paid. Both payments serve the purpose of enlarging for a year the member's opportunity to enjoy the Club's services, and mere differences in nomenclature should not alter their equal liability to taxation under the statute. Cf. *United States* v. *Anderson*, 108 F. (2d) 475 (C. C. A. 7), certiorari denied, 309 U. S. 688.

Petitioner seems to contend (Br. 16–27), however, that the Commissioner and the Government are bound by a construction of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, which would exempt the instant golf fees from tax, because in 1926, there were deleted from the Treasury Regulations provisions expressly covering such fees, and Congress reenacted Section 501 in 1928. But these

events at most left the situation ambiguous. Petitioners depend on the negative fact of the absence of the earlier regulations, for no new regulation was promulgated which exempted such payments as are here in controversy. Nor was the administrative practice in respect of such payments consistent. Until 1926, immediately after *Weld* v. *Nichols*, 9 F. (2d) 977 (Mass.) was decided, such payments were administratively held to be subject to the tax (R. 20–21). From 1926 to 1930, no tax was claimed against such payments, but following the decision in *Foran* v. *McLaughlin*, 59 F. (2d) 158 (C. C. A. 9), certiorari denied, 287 U. S. 637, payments for golf privileges such as those involved in the instant case were again, and have been continuously since, held by the Commissioner to be subject to the tax (R. 21). Plainly there was not here such a consistent administrative practice and construction as to be binding. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 280; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16. And in any event, it is clear that the limited administrative practice which exempted golf fees was to conform to the apparent compulsions of the *Weld* case; the Commissioner cannot, then, be deemed to have bound himself by the change in 1926. *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Hallock*, 309 U. S. 106, 121.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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J. LOUIS MONARCH,
Acting Assistant Attorney General.

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Attorney.

DECEMBER, 1941.

APPENDIX

Revenue Act of 1928, 45 Stat. 791:

SEC. 413. CLUB DUES TAX.

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assess-

ments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned." (U. S. C., Title 26, Secs. 950–952.)

Treasury Regulations 43 (1928 Rev.) (Part II):[13]

ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, That the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an "active resident annual member" of such club are in excess of $25 per year. "An active resident annual member" is a member who is neither a life nor a nonresident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associte or other partial membership.

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[13] Article 40 of the 1932 revision of Treasury Regulations 43 is identical with the 1928 revision except that in the first sentence the words "Section 501" are substituted for "The Revenue Act of 1928."

The term "dues" is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore, not taxable.

Examples.— * * *

* * * * *

(5) A certain golf club has two classes of members. Class A members pay $40 per

year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to tax.

(6) A certain golf club charges a "green" fee of $1 for each guest that uses the course. Such a fee is not paid "as dues or membership fees," and is, therefore, not taxable as such.

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(8) A tennis club in which the annual dues are $25 levies an assessment of $2 per year on each member to cover cost of tennis balls. The dues, fees, and such assessments paid by members of this club are taxable.

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U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 83.—October Term, 1941.

Merion Cricket Club, Petitioner.
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 12, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The question in this case—whether amounts paid by members of the Merion Cricket Club during the period from July 1, 1931, to June 30, 1935, for golf privileges, constituted payments as "dues or membership fees" subject to the tax imposed by § 501 of the Revenue Act of 1926, 44 Stat. 9, 92, as amended by Section 413 of the Revenue Act of 1928, 45 Stat. 791, 864—does not differ in substance from that decided this day in *White* v. *Winchester Country Club*, *ante*, p. —.

With certain exceptions, a member of the Merion Cricket Club could obtain annual golf privileges only by payment of a fee, which varied in amount according to his age and status. The fee was payable in two equal installments, one on the first of January, and the other on the first of July. A member admitted to golf privileges after the latter date was entitled to remission of one-half of the annual fees, but if one stopped using the golf facilities during the year there was no proportionate refund. If a member elected to play golf he continued to be liable for the succeeding year unless he gave notice of withdrawal before the end of the year. Members who paid the annual golf fees were entitled to use the golf facilities as often as they desired without further charge, and could on occasion obtain golf privileges for their wives and guests.

After a claim for refund of the amounts alleged to have been paid as taxes on the annual golf fees had been duly filed and rejected, the Club on its own behalf and on behalf of its members sued the United States in the United States District Court for the Eastern District of Pennsylvania to recover them. The District Court

entered a judgment for the United States which was affirmed on appeal to the Circuit Court of Appeals for the Third Circuit. 119 F. 2d 578. Certiorari was granted in this case and in *White* v. *Winchester Country Club, ante*, p. —, because of an asserted conflict between the decisions below. 313 U. S. 555; 314 U. S. —.

In this case, as in *White* v. *Winchester Country Club, supra*, we hold that amounts paid were paid as "dues or membership fees," since they were for rights to the repeated and general use of a common club facility for an appreciable period of time, and were not fixed by each occasion of actual use.

The decision below is therefore

Affirmed.

Mr. Justice ROBERTS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.